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1892.

THE

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QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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1892.

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1892.

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78	1	"right"	"wrong."
100 (Note 2)		"1890"	"1892."
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DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1891. 1892.

WILSON *v.* VESTRY OF ST. GILES, CAMBERWELL.

1891
June 1;
Nov. 2

Metropolis—Management Acts—Street—"New Street"—Paving Expenses—Liability of Owner of Houses—18 & 19 *Vict. c.* 120, *ss.* 105, 250—25 & 26 *Vict. c.* 102, *s.* 112.

A vestry sought to charge the owner of houses in a road with the expenses of paving the road, including the footway, which was on January 1, 1856 (when the Metropolis Management Act, 1855, came into operation), an ancient footway repairable by the inhabitants at large, and had been from time to time repaired by the vestry at the expense of the ratepayers.

The roadway, as distinguished from the footway, had never been repaired by the vestry, and the maintenance of the road had not, previously to January 1, 1856, been taken into charge or assumed by the authorities having control of the pavements or highways.

The footway had been tar-paved by the vestry at the cost of the ratepayers, but there was no record of its having been kerbed by the vestry, and such tar-paving and other work as had been done from time to time was in the nature of repairs of a temporary character:—

Held, that the road, including the footway, was a "new street," within the

1891

WILSON v. VESTRY OF ST. GILES, CAMBERWELL.

meaning of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 112, and the owner of the houses was liable to contribute to the paving expenses.

Vestry of St. Giles, Camberwell v. *Hunt* (56 L. J. (M.C.) 65) distinguished.

CASE stated by a metropolitan police magistrate.

The appellant appeared in answer to three several summonses, by which the respondents claimed three sums of 6*l.* 4*s.* 6*d.*, 15*l.* 0*s.* 2*d.*, and 8*l.* 17*s.* 10*d.*, the amount of the contribution apportioned upon the appellant by the respondents in respect of three houses, 41, 42, and 43, Camberwell Green, under the 105th section of the Metropolis Management Act, 1855, and the 77th section of the Metropolis Management Amendment Act, 1862, for paving Camberwell Green, as being a new street, within the meaning of those Acts. The following facts were admitted or proved:—

The appellant was the owner of three houses, which formed part of a continuous row of seventeen houses, built sometime prior to 1855, situate on the east side of a road known as Camberwell Green, in the district of the respondents, and leading from Church Street to Waterloo Street. There were no buildings on the west side of the road, but the road was bounded on the west by Camberwell Green, a public pleasure-ground vested in the respondents.

There was no footway on the west side of the road, but on the east side of the road there was a footpath, which was on January 1, 1856, an ancient footway repairable by the inhabitants at large, and which had been from time to time since July 1, 1856, repaired by the respondents at the cost of the ratepayers generally.

The roadway of Camberwell Green, as distinguished from the footway had never been repaired by the respondents, and the maintenance of the roadway had not previously to January 1, 1856, been taken into charge or assumed by the authorities having control of the pavements or highways.

In pursuance of a resolution of April 23, 1873, the footway on the east side of Camberwell Green was tar-paved by the respondents at a cost of 25*l.*, which cost was charged by the respondents upon the ratepayers generally. Tar-paving, as distinguished

from asphalte, is not considered by the respondents to be permanent paving. On March, 19, 1890, the respondents, by a resolution which recited that Camberwell Green (east side), from Church Street to Waterloo Street, was a new street as defined by the Metropolis Management Act, 1855, and the Metropolis Management Amendment Act, 1862, was not paved to the satisfaction of the respondents, and that the respondents deemed it necessary and expedient that the same should be completely paved under the powers of the said Acts, resolved that the same should be paved, and that an estimate and apportionment of the expenses of paving the same should be made. On June 4, 1890, the respondents approved the estimate of the surveyor for paving Camberwell Green (east side), from Church Street to Waterloo Street, and apportioned the amount of such estimate amongst the owners of houses and land on the said street, including the respondents as owners of Camberwell Green. The estimate and apportionment included the cost of repairing the footway on the east side of the road.

The respondents thereupon demanded from the appellant the three several sums of 6*l.* 4*s.* 6*d.*, 15*l.* 0*s.* 2*d.*, and 8*l.* 17*s.* 10*d.*, being the sums apportioned upon the appellant, as owner of 41, 42, and 43, Camberwell Green.

It was contended on the part of the appellant that Camberwell Green was not a "new street" within the terms and meaning of the Acts; that for the purposes of the Acts the footpath should be treated as distinct from the roadway, and that, even assuming the roadway was a new street within the meaning of the Acts, the footpath was not a new street, and that, one apportionment having been made in regard both to the footway and roadway, such apportionment was bad and not enforceable; that, assuming the footpath was a "new street" within the meaning of the Acts, the respondents could not now exercise their powers under the above-named sections, inasmuch as such footpath had been tar-paved by the respondents in 1873, and the cost of such tar-paving charged upon and defrayed out of the rates.

It was contended on behalf of the respondents, that Camberwell Green was a "new street" within the meaning of s. 112 of the Metropolis Management Amendment Act, 1862, as being a

1891

WILSON v. VESTRY OF ST. GILES, CAMBERWELL.

street the maintenance of the paving and roadway whereof had previously to January 1, 1856, been taken into charge or assumed by the authorities having control of the pavements or highways, and also as being a street partly formed or laid out, and that the apportionment was properly made.

The magistrate found that there was no record of the pathway in question having been kerbed by the respondents, and that such tar-paving and other work as had been done from time to time was in the nature of repairs of a temporary character, and held that the street in question was a new street within the meaning of the Acts, that the apportionment was properly made, and that the appellant was liable. He therefore made orders upon the appellant for the sums claimed.

The question for the opinion of the Court was whether this decision was right in point of law. (1)

(1) By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120, which by s. 251, came into operation on January 1, 1856), s. 105: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board.")

By s. 250: "The word 'street' shall apply to and include any highway (except the carriage-way of any turnpike road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage."

By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 112: "The expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out."

1891. June 1. *Garrett*, for the appellant. The road in question is not a "new street" within the meaning of 25 & 26 Vict. c. 102, s. 112, and therefore the apportionment is bad, and the appellant is not liable to pay: *Vestry of St. Giles, Camberwell* v. *Hunt.* (1)

Austin, for the respondents. The vestry had a right to deal with the road as a whole. It is a "new street," and the apportionment was rightly made: *Dryden* v. *Overseers of Putney* (2): *Attorney General* v. *Wandsworth District Board of Works.* (3)

Garrett, in reply.

Cur. adv. vult.

1891. Nov. 2. The judgment of the Court (Cave and Charles, JJ.), was delivered by

CHARLES, J. In this case the appellant was summoned under s. 105 of the Metropolis Management Act, 1855, before a metropolitan magistrate, to recover a proportion of certain paving expenses, which had been incurred by the respondents in paving part of a road bounded on the east by a row of houses, three of which belonged to the appellant, and on the west by an open space called Camberwell Green. Whether the respondents could recover or not depended on the question whether this road was a "new street" within the meaning of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105, and the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 112.

The road in question has on the west side the open green; and on the east there is a footpath, which on January 1, 1856, when 18 & 19 Vict. c. 120 came into operation, was repairable by the inhabitants at large, and which has been from time to time since that date repaired at the ratepayers' expense by the respondents. The footpath was undoubtedly a "street" within the definition given in s. 250 of the Act, and vested in and came under the management of the respondents under s. 96. The roadway of the road has never been repaired by the respondents, nor had the

(1) 56 L. J. (M.C.) 65.

(2) 1 Ex. D. 223.

(3) 6 Ch. D. 539.

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management ever been assumed previously to the passing of the Act of 1862 by the authorities having control of pavements and highways in the metropolis. In 1873 the respondents tar-paved the footway in pursuance of a vestry resolution at a cost of 25*l.*, which was charged on the ratepayers generally. Tar-paving is not considered by the respondents to be "permanent" paving, as distinguished from asphalte, and the magistrate found as a fact that it was in the nature of repairs of a temporary character. He also found that all other repairs which had been done were temporary only. On March 19, 1890, they passed a resolution whereby, after reciting that Camberwell Green Road was a "new street," as defined by the Metropolis Management Acts, and not paved to their satisfaction, and that it was expedient to pave it completely, it was resolved that it should be so paved, and that an estimate and apportionment of the expenses should be made. This estimate was afterwards made and approved, and the apportioned amount demanded of the appellant, according to the provisions of s. 105 of the Act of 1855. He refused payment, and thereupon these proceedings were instituted. The magistrate held that the road, both carriage and footway, was a "new street" within the Acts, and that the appellant was liable. He accordingly ordered payment of the sums claimed, subject to the opinion of this Court on the question whether he was right in point of law in holding the road to be a new street.

Now in the earlier statute, although the term "street" is defined by s. 250, the term "new street" is not, and whether a street were a "new street" or not seems to have been treated in each case as a question of fact. But by s. 112 of the Act of 1862 (25 & 26 Vict. c. 102), it is enacted that, "the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not previously to the passing of this Act been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out." It is also thereby enacted that "the word 'pave' shall apply to

and include the formation of the roadway or footway of any street."

It was contended by the appellant that the footpath should have been treated as distinct from the roadway, and that assuming the roadway to be a new street within the Acts, the footpath was not, inasmuch as it had been paved, repaired, and taken in charge prior to the Act of 1862 by the public paving authorities. And it certainly does appear somewhat strange that an owner whose premises abut on a public footway repairable by the inhabitants at large, and which has been repaired by the public authorities at the ratepayers' expense, should afterwards be called on to pay a proportion of paving expenses in respect of that footpath, simply because the paving authorities resolve to treat it together with a roadway which has not been repaired or taken in charge.

But after a careful consideration of the 112th section, we are of opinion that Camberwell Green Road, treated as a whole, does come within the definition there given of "new street." It is, when so regarded, "a place the maintenance of the paving and roadway whereof had not previously to the passing of the Act of 1862 been taken into charge and assumed" by the paving authorities. The paving of the footway had been taken into charge, but not of the roadway, and this street accordingly comes exactly within the words of the section. To remove it from the category of "new streets," both footway and roadway must have been taken in charge and assumed. And there is nothing, in our opinion, to prevent the authorities from treating the street as a whole, although the footway and roadway are both "streets" within the definition clause. On the contrary, we think the section contemplates that streets should be so dealt with. It may be observed that s. 150 of the Public Health Act, 1875, furnishes an example of similar legislation. Under that section the frontager on a street may have liability cast upon him, even although a part of the street consist of a footway repairable by the inhabitants at large.

It is, however, suggested that the case of the *Vestry of St. Giles, Camberwell* v. *Hunt* (1) is a decisive authority in favour of

(1) 56 L. J. (M.C.) 65.

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the appellant. There a local authority had in 1876 paved, out of the general rates, the footpath of a new street. Ten years later they resolved to pave the same footpath again under s. 105 of the Act of 1855, at the expense of the adjoining owners. It was held that they could not do so, on the ground that they had already exercised their powers under that section over exactly the same place.

No such question as that now raised arose. The magistrate, moreover, in that case found that the paving done in 1876 was, and was intended by the vestry to be, of a permanent and not of a temporary character, and had been done under s. 105 of the Act. In the present case the magistrate has found that the work done on the footpath was temporary only; such in fact as would be done to a highway under s. 98 of the Act of 1855, and not under s. 105. The case referred to, therefore, is distinguishable, and is quite consistent with the conclusion at which we have arrived. The decision of the magistrate must be affirmed, and this appeal dismissed with costs.

Judgment for the respondents.

Solicitors for appellant: *Warburton & De Paula.*
Solicitors for respondents: *G. W. Marsden & Sons.*

P. B. H.

Nov. 5.

WHITEBREAD, APPELLANT; THE SEVENOAKS HIGHWAY BOARD, RESPONDENTS.

Highway—Repair—"Extraordinary Expenses"—Excessive Weight—"Extraordinary Traffic"—Conveyance of Stone—Highways and Locomotives Amendment Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

The expressions "extraordinary expenses" and "extraordinary traffic" in s. 23 of the Highways and Locomotives Amendment Act, 1878, mean expenses and traffic which are extraordinary with reference to the particular road in question.

The appellant was summoned by a highway board to recover expenses incurred by the board in repairing a road in their district during a period of seven years. The expenses were incurred in consequence of stone having been carted by the appellant from a quarry along the road, which was an ordinary country road, used for ordinary light country traffic, and had never been adapted for, or made up to bear, heavier traffic. Stone traffic was a

recognized business in the neighbourhood, but was not the ordinary or recognized traffic of the road in question:—

Held, that the magistrates were justified in finding that the expenses and traffic were "extraordinary" within the meaning of s. 23 of the Highways and Locomotives Amendment Act, 1878, and that an order for payment was rightly made.

CASE stated by justices.

The appellant was summoned upon the complaint of the respondents for that he on divers days and times between March, 1883, and March, 1890, did cause extraordinary traffic and excessive weight to be conducted along so much of the highway leading from the red finger- or guide-post in Ide Hill Road to Fig Street, in the parish of Sevenoaks, as did lie within the respondents' district, whereby damage had been caused to the highway, and the respondents had incurred extraordinary expense in repairing the same, the appellant not having entered into any agreement with the respondents for the payment to them of a composition in respect of such extraordinary traffic.

On the hearing of the summons it was proved that the appellant and one George Rye had carted stone daily from a quarry known as Pitfield Quarry, along Fig Street Road, and being about five furlongs in length, from March, 1883, to March, 1890, and were still continuing to do so.

On February, 26, 1891, the surveyor to the Sevenoaks District Highway Board, then being the local authority liable to repair the highway, gave a certificate that, having regard to the average expense of repairing highways in the neighbourhood of the highway thereinafter mentioned, extraordinary expenses had been incurred by the Sevenoaks District Highway Board in repairing a certain highway which the Sevenoaks District Highway Board were liable to repair, to wit, the highway leading from the red finger- or guide-post in Ide Hill Road to Fig Street, in the parish of Sevenoaks; that such extraordinary expenses had been incurred by reason of the damage caused by the conducting of excessive weight or extraordinary traffic, or excessive weight and extraordinary traffic, over and upon or along the highway; that such excessive weight or extraordinary traffic, or both of them, were conducted by order of Henry Whitebread and George Rye; and that the amount of such extraordinary expenses for the

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period between March, 1883, and March, 1890, was 339*l.* 18*s.* 6*d.*, and he certified that the proportion of such amount for which Henry Whitebread was liable was 182*l.*

The average cost of repair of five furlongs of road in the district of the highway board during the period from March, 1883, to March, 1890, was 9*l.* 12*s.* 3*d.* per annum, and the average cost of repairing the five furlongs in question of Fig Street Road during the said period was 46*l.* 11*s.* 7*d.*

The road in question was, prior to 1883, and had since always remained, an ordinary country road, used for ordinary light country traffic, and had never been adapted for, or made up to bear, any other traffic than traffic of that description, and the repairs to the road had always been sufficient for making the road fit to bear such traffic.

The quarry known as Pitfield Quarry, which was a private quarry, had been opened several years prior to March, 1883, and stone had occasionally, but very rarely, been carted from the quarry along Fig Street Road prior to that date, and then not in sufficient quantities to cause any unusual damage to the road. As a rule the stone was carted from such quarry along other roads in the neighbourhood.

The appellant had carted in the year ending	Tons	Cwt.	Qrs.
March, 1884	4837	5	0
of stone along the road.			
In the year ending March, 1885 . . .	5725	1	2
„ „ „ 1886 . . .	3672	2	0
„ „ „ 1887 . . .	2914	14	1
„ „ „ 1888 . . .	2762	18	1
„ „ „ 1889 . . .	2964	8	1
„ „ „ 1890 . . .	2919	5	0
	25,795	14	1

Such stone, as well as the stone carted by George Rye, was carted for the urban authority of Tonbridge Wells Local Board, who held a lease of the quarry, and who had during the above period and still were continuing to work it solely for their own purposes.

There were several stone quarries which were worked, and for several years had been worked, in the district of the highway board, the stone traffic being a recognized business in the neighbourhood, and some of the roads in the district were made up so as to bear the traffic of stone carts. None of the stone from the other quarries had ever come along Fig Street Road, and Fig Street Road had never been made up to bear such traffic. It was found as a fact that the stone traffic was not prior to 1883, and had never at any time during the period between 1883 and 1890 been the ordinary or recognized traffic of the road in question, or a recognized business along the road.

The surveyor to the highway board first became aware in 1883 that a regular traffic with stone carts was being conducted along the road in question by the appellant and George Rye, the carts used being ordinary carts used for the purpose of carting stone, and that extraordinary expense was being incurred in consequence in repairing the road. The damage done to the road, which was caused solely by reason of such stone traffic, increased year by year, and required much heavier repairs in order to make the road fit for the ordinary traffic along the road. No certificate was given by the surveyor in respect of the traffic or expenses until February 26, 1891.

The total cost of repairing Fig Street Road from March, 1883, to March, 1890, amounted to 328*l.* 1*s.* 3*d.*

It was contended for the appellant that, stone traffic being a recognized business in the neighbourhood, and the quarry having been opened and stone carted along the road prior to 1883, the traffic in question was not extraordinary traffic within the meaning of the Highway Act, 1878 (41 & 42 Vict. c. 77), s. 23, and that, even if it were extraordinary in 1883, it did not continue to be extraordinary in every year up to March, 1890, and that it was the duty of the highway surveyor, upon notice that the road was being regularly used for the purpose of stone traffic, to make up such road so as to bear such traffic.

It was contended for the respondents that the traffic was extraordinary, and the weight excessive during the whole of such period, and that it was competent to the surveyor to give his certificate, as in this instance, at the end of seven years,

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and that the respondents were entitled to recover 328*l.* 1*s.* 3*d.*, divided in proper proportions between the appellant and George Rye, or such other sum as the justices might assess as extraordinary expenses within the meaning of the statute.

It was found as a fact that the traffic was extraordinary traffic and the weights excessive, within the meaning of the statute, during the whole of the said period, and it was also found as a fact that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses had been incurred by the respondents in repairing such highway by reason of the damage caused by such extraordinary traffic and excessive weight, and the justices ordered the appellant to pay the respondents 175*l.* 19*s.* 5*d.*, being his proportion of 328*l.* 1*s.* 3*d.*, and being the amount of such expenses as was proved to have been incurred by the respondents by reason of so much of the excessive traffic and weight as were conducted by order of the appellant, and the respondents' costs.

The question for the opinion of the Court was whether, under the circumstances, the justices had power in law to make the order for the payment of the expenses incurred during the whole of the period of seven years. If the Court should answer the question in the affirmative the order was to stand. If the Court should be of opinion that the justices could make such order for any portion of such period, then the order was to be varied by altering the amount to such sum as the Court might fix, or the case was to be remitted to the justices for their further consideration, as the Court might think fit to direct. If the Court should be of opinion that the justices could not lawfully make an order in respect of any part of such period, then the order was to be quashed. (1)

(1) By the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 23: "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satis-

The case was argued by
Avory, for the appellant, and
Dickens, for the respondents.

The arguments are stated in the special case and in the judgments.

[The following authorities were referred to: *Wallington* v. *Hoskins* (1); *Reg.* v. *Williamson* (2); *Raglan Highway Board* v. *Monmouth Steam Co.* (3); *Pickering Lythe East Highway Board* v. *Barry* (4); *Reg.* v. *Ellis.* (5)]

MATHEW, J. Our judgment must be for the respondents. The question is whether the justices could properly make the order which they have made. That question turns on s. 23 of the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77). The justices thought they ought to make an order for the payment of extraordinary expenses under the following circumstances:—The road in question up to the year 1883 was not ordinarily used for the carriage of stone, but from 1883 to 1890 the appellant carried stone over the road, and in consequence of his doing so the highway authority was put to expense which the justices held to be within the term "extraordinary expenses" in s. 23. Mr. Avory contends that such traffic as this may have been extraordinary traffic in the first instance, but would become ordinary traffic after it had been carried on for a considerable time. The ordinary use of the road by the public did not include the carting of stone. The purpose for which the road was used by the appellant was clearly extraordinary in the first instance, and it seems to me it has never ceased to be so. It was argued that it was hard that the respondent did not have earlier notice that he was incurring the liability in question. But we must take it that the appellant was aware of the existence of the statute, and it must also be assumed that he was aware that expenses would be incurred by

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faction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

(1) 6 Q. B. D. 206.
(2) 45 J. P. 505.
(3) 46 J. P. 598.
(4) 8 Q. B. D. 59.
(5) 8 Q. B. D. 466.

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the highway authority in consequence of what he was doing. There is no limit of time, as has been suggested, in the Act.

A. L. SMITH, J. I agree with the judgment of Mathew, J. In some of the cases the justices found that the expenses were not extraordinary, and the question has arisen whether they ought not to have found that they were extraordinary expenses, whereas in the present case they have found that the expenses were extraordinary, and the question is whether they were justified in so finding. It is true that in *Pickering Lythe East Highway Board* v. *Barry* (1), Lopes, J., expressed an opinion that "the legislature intended something unusual in weight or extraordinary in the kind of traffic, either as compared with what is usually carried over roads of the same nature in the neighbourhood, or as compared with that which the road in its ordinary and fair use may be reasonably subjected to." That expression of opinion, however, was unnecessary for the decision of the case, and cannot be treated as amounting to more than a dictum, and in *Reg.* v. *Ellis* (2), Bowen, J., considered the definition suggested by Lopes, J., and he did not agree with it, for he said, "I have had occasion to consider this passage in the judgment of my Brother Lopes, and I cannot adopt it to its full extent." The question in the present case is whether the expenses in question are extraordinary, and, according to the decision in *Reg.* v. *Ellis* (3), they are.

Judgment for the respondents.

Solicitors for appellant: *Sole, Turner, & Knight, for Cripps & Son, Tonbridge Wells.*

Solicitors for respondents: *Prior, Church, & Adams, for Gorham Warner & Son, Tonbridge.*

(1) 8 Q. B. D. at p. 62. (2) 8 Q. B. D. at p. 469.
(3) 8 Q. B. D. 406.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1891
Nov. 9.

EX PARTE PORTINGELL.

Licensing Acts—Licence for Sale of Intoxicating Liquors—Renewal of Licence —Notice of Intention to Oppose—Service of Notice—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42.

The 42nd section of the Licensing Act, 1872, provides that the justices shall not entertain any objection to the renewal of a licence, unless written notice of an intention to oppose such renewal has been "served on" the holder not less than seven days before the commencement of the general annual licensing meeting.

A notice under the above section need not be served personally on the holder of the licence: therefore, where such a notice was left with a servant on the licensed premises, and came to the hands of the holder of the licence in due time:—

Held, that there had been sufficient service of such notice.

APPLICATION for a rule nisi for a mandamus to the justices of Glamorganshire in quarter sessions to hear and determine an application for a renewal of a licence for sale of intoxicating liquors.

The applicant applied at the last general annual licensing meeting for a renewal of his licence. Objection being taken to such renewal, it was contended on behalf of the applicant that the justices had no jurisdiction to entertain such objection because there had not been personal service of notice of the intention to oppose the renewal. (1) The justices overruled this contention, and, after hearing evidence in support of the objection to the renewal, refused to renew the licence. The applicant appealed to the quarter sessions, one of the grounds of such appeal

(1.) Sect. 42 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), provides as follows: (2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given.

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being that the justices had no jurisdiction to entertain the objection to the renewal of the licence, because there had been no personal service of the notice of intention to oppose the renewal. The facts with regard to service of the notice were these: It appeared that a written notice of intention to oppose the renewal had been left by the party opposing the renewal with a boy of fourteen on the licensed premises. The applicant denied that this notice was given to him; but the boy was not called, and the magistrates came to the conclusion that the notice had in fact come to the hands of the applicant in due time. The sessions affirmed the refusal to renew the licence. The applicant thereupon moved the Divisional Court (Mathew, and A. L. Smith, JJ.) for a rule for a mandamus as above, which was refused.

James Paterson, for the applicant, moved by way of appeal for a rule nisi for a mandamus. (1)

The 42nd section of the Licensing Act, 1872, makes it a condition precedent to the jurisdiction of the magistrates to entertain any objection to the renewal of the licence, that a written notice of objection should have been "served on" the holder. These words import that there must have been a service of the notice by the objector on the holder of the licence personally. The provisions of s. 70, which expressly give an alternative mode of service by post, shew by implication that this is so.

[He referred to *Reg.* v. *Deputies of the Freemen of Leicester* (2); *Goggs* v. *Lord Huntingtower*. (3)]

Lord Esher, M.R. In this case the question is whether personal service of the notice of objection to the renewal of the licence is necessary, in the sense contended for, in order to give the justices jurisdiction to inquire into the objection. The argument goes to this extent, viz., that, though it were proved that the notice had been served on a servant of the holder of the

(1) The Court expressed doubt whether mandamus was the proper remedy under the circumstances of the case: but it became unnecessary for them to decide that point, as they were of opinion that the decision of the sessions was correct.

(2) 15 Q. B. 671.

(3) 12 M. & W. 503.

licence, and that the servant immediately handed it to his master, there would not be a valid service; in other words, that service can only be effected by the person serving the notice putting it into the hands of the person to be served. The question whether that is so depends on the construction of the 42nd section of the Licensing Act, 1872. The words used in that section are, "unless written notice of an intention to oppose the renewal of such licence has been served on such holder."

In the case of *Reg.* v. *Deputies of the Freemen of Leicester* (1), which was cited to us, Lord Campbell laid down the rule thus: "In general, when personal service is required by an Act, it is so said in express words; but here the words used are 'give or deliver notice in writing unto such deputy,' which have no such force." We have to say whether we agree with the rule so laid down, and, if so, what its application is to the present case. It appears to me to be a very sensible rule of interpretation. Applying it to the present case, the words here are "has been served on." The words in the Act there being interpreted were "give or deliver unto." It was argued that there was a substantial difference between the two expressions. I do not think that is so. It seems to me that one is the exact equivalent of the other. Upon this interpretation of the Act personal service in the sense contended for by the applicant was not necessary. The magistrates inquired into the question whether the notice had come to the hands of the applicant in due time. He swore that it had not, but the boy to whom it had been handed was not called. The magistrates appear to have come to the conclusion that there was some error of memory on the part of the applicant, and that the notice did come to his hands in time. That was a decision of fact on their part which we have no power to review. For these reasons I think the application must be refused.

FRY, L.J., and LOPES, L.J., concurred.

Application refused.

Solicitors for applicant: *Riddell & Co., for J. H. Jones.*

(1) 15 Q. B. 671.

E. L.

1891
Oct. 23.

EDMUNDS, APPELLANT; JAMES, RESPONDENT.

Licensing Acts—Offences—Permitting Drunkenness on Premises—Sale of Liquor to Drunken Person.

A licensed person who sells intoxicating liquor on his premises to a drunken person is liable to be convicted under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 13, of the offence of permitting drunkenness to take place on his premises.

CASE, stated by justices in quarter sessions.

The appellant, Henry Edmunds, the occupier of the Rising Sun Inn, was convicted by justices of the offence of permitting drunkenness to take place on his premises.

The court of quarter sessions affirmed the conviction subject to the following case:—

John Griffiths came into the taproom of the Rising Sun on October 7, 1890. Griffiths was drunk at the time he came into the inn, and three pennyworth of whisky was sold to him while he was in the inn. It was contended by the appellant that the conviction was wrong, inasmuch as Edmunds had not permitted drunkenness to take place on his premises, and that while a licensed person who sells intoxicating liquor to a person who comes drunk on to licensed premises may be convicted under the section of the offence of selling intoxicating liquor to a drunken person, he cannot be convicted of the offence of permitting drunkenness to take place on his premises. It was contended by the respondent that the appellant, by selling intoxicating liquor to a drunken person, had permitted drunkenness to take place on his premises. If the Court should be of opinion that Edmunds did by reason of the facts stated permit drunkenness to take place on his premises within the meaning of s. 13 of the Licensing Act, 1872 (1), the conviction was to stand confirmed; but if the Court should be of a contrary opinion, the conviction, and the order of quarter sessions confirming the same, was to be quashed.

(1) By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 13, "If any licensed person permits drunkenness, or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds."

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Ram (*Jelf, Q.C.*, with him), for the appellant. The conviction is wrong. The point raised, though it has previously come before justices, has never been decided by a Superior Court. The appellant's contention, that the section is disjunctive, and that, though he may have been liable to be convicted of selling liquor to a drunken person, he cannot on these facts be convicted of permitting drunkenness to take place on his premises, is correct. [He referred to *Warden* v. *Tye.* (1)]

Lawson Walton, Q.C., and *William Daniell*, for the respondent, were not called on.

MATHEW, J. This case presents no question of difficulty, and I am not surprised that there has been no decision on the point. The section in question (35 & 36 Vict. c. 94, s. 13) provides for the punishment of licensed persons who permit drunkenness on licensed premises, and of licensed persons who sell liquor to those who are drunk. In the present case, a man came into a public-house being already drunk, and was supplied with more liquor and made more drunk, and under those circumstances drunkenness was permitted on the premises. In order to accede to the contention of the appellant, it would be necessary to read the first part of the section as if the words were "If any licensed person permits drunkenness otherwise than by selling liquor to a drunken person:" such a construction would be unreasonable.

A. L. SMITH, J. I am of the same opinion, and I will only add that the first part of the section is intended to meet the case where there is no sale; but it does not follow that a man who is guilty of an offence against that provision may not also be guilty of an offence against the last part of the section.

Conviction affirmed.

Solicitors for the appellant: *Few & Co., for Bythway & Son, Pontypool.*

Solicitors for the respondent: *Le Brasseur & Oakley, for Le Brasseur & Bowen, Newport.*

(1) 2 C. P. D. 74.

P. B. H.

1891
Oct. 30.

HORNSBY, APPELLANT; RAGGETT, RESPONDENT.

Gaming—Permitting Room to be used for Betting—16 & 17 *Vict. c.* 119, *ss.* 1, 3.

The respondent, the keeper of a beerhouse, was charged, under 16 & 17 Vict. c. 119, s. 3, with permitting the same to be used for the purpose of betting with persons resorting thereto.

On five different days a bookmaker and his clerk were in the bar and tap-room of the beerhouse, and used the bar and tap-room for the purpose of betting, and did bet, upon horse-races with persons resorting thereto. The respondent was present, and knew of and permitted such user. The bookmaker and clerk did not occupy any specific place in the bar or tap-room, and had no interest or property in the premises:—

Held, that the respondent had knowingly and wilfully permitted a room to be used for the purpose of betting with persons resorting thereto, within the meaning of the statute, and ought to be convicted.

Whitehurst v. *Fincher* (54 J. P. 565; 62 L. T. (N.S.) 433), and *Snow* v. *Hill* (14 Q. B. D. 588), distinguished.

CASE stated by a metropolitan police magistrate.

Frank Raggett, the respondent, was charged upon the information of George Hornsby, an inspector of Metropolitan Police, for that he, being the occupier of a certain house, to wit, "The Chimes" beerhouse, did unlawfully, knowingly, and wilfully permit the same to be used by other persons, whose names were unknown, for the purpose of betting with persons resorting thereto, contrary to s. 3 of the Act 16 & 17 Vict. c. 119, entitled, "An Act for the Suppression of Betting-houses." At the hearing of the information the following facts were proved:—

The respondent was, on the date named in the information, the occupier and keeper of a licensed beerhouse, called "The Chimes," situate in Woollett Street, Poplar.

On April 25, 1891, and on four other days immediately prior thereto, a person who was described as a professional betting man or bookmaker, and his clerk, were in the bar and tap-room of the beerhouse, for the purpose of betting, and did there bet, with persons resorting thereto upon certain events and contingencies of and relating to certain horse-races. The respondent was in the bar.

Neither the bookmaker nor his clerk occupied any specific

place in the bar or tap-room (which were public rooms), and no evidence was given to shew that the bookmaker or his clerk had any interest or property in the premises, or any part thereof, or in the keeping, management or tenancy thereof, or of the bar or tap-room, or used any part of the house except the tap-room and the public portion of the bar, and then not exclusively, but in common with the ordinary customers of the house and the public thereto resorting.

Upon the evidence above stated the magistrate found as a fact that the bar and tap-room of the beerhouse were used by the bookmaker and his clerk for the purpose of betting with persons resorting thereto, and of receiving money as the consideration for an agreement, express or implied, to pay money on events or contingencies relating to horse-races, and that the respondent knew of and permitted such user.

It was contended on the part of the defendant that the user by the bookmaker and his clerk did not constitute an offence by the bookmaker or his clerk within the meaning of 16 & 17 Vict. c. 119, ss. 1, 3, by reason of the decisions of *Whitehurst* v. *Fincher* (1), and *Snow* v. *Hill* (2), and that, therefore, the respondent had not committed any offence against ss. 1 and 3 of the Act by permitting the user.

It was contended for the prosecution, first, that the bookmaker, upon the facts found, had committed an offence within 16 & 17 Vict. c. 119, ss. 1, 3, by reason of the decisions in *Eastwood* v. *Miller* (3), *Haigh* v. *Town Council of Sheffield* (4), and *Slatter* v. *Bailey* (5); and, secondly, that the respondent, upon the true construction of the sections, and upon the facts found, was guilty of the offence charged in the information in permitting the bookmaker to use the premises for the purpose of betting with persons resorting thereto, even if the bookmaker was not himself guilty of an offence under the sections.

The magistrate was of opinion that, by reason of the decisions in *Whitehurst* v. *Fincher* (1) and *Snow* v. *Hill* (2), the bookmaker could not, on the evidence, have been convicted of an offence

(1) 54 J. P. 565; 62 L. T. (N.S.) 433.
(2) 14 Q. B. D. 588.
(3) Law Rep. 9 Q. B. 440.
(4) Law Rep. 10 Q. B. 102.
(5) 37 J. P. 262.

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under ss. 1 and 3 of the Act, and that consequently it was not an offence against those sections for the respondent to permit the bookmaker to use the beerhouse in the manner described. He therefore dismissed the information.

The question upon which the opinion of the High Court was desired was whether upon the above statement of facts the magistrate came to a correct decision in point of law, and, if not, what should be done in the premises?

16 & 17 Vict. c. 119 is entitled "An Act for the Suppression of Betting Houses."

By s. 1: "No house, office, room, or other place, shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto."

By s. 3: "Any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them," shall be liable on summary conviction to a penalty not exceeding 100*l.*

The case was argued by

C. F. Gill, for the appellant, and

Lyon, for the respondent.

The arguments are stated in the special case and the judgments.

In addition to the authorities referred to in the case stated by the magistrate, the following were cited:—*Doggett* v. *Catterns* (1); *Shaw* v. *Morley* (2); *Bows* v. *Fenwick* (3); *Gallaway* v. *Maries* (4); *Reg.* v. *Cook* (5); *Reg.* v. *Preedy, Love, Sexton, and James* (6); *Davis* v. *Stephenson.* (7)

(1) 17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765.

(2) Law Rep. 3 Ex. 137.

(3) Law Rep. 9 C. P. 339.

(4) 8 Q. B. D. 275.

(5) 13 Q. B. D. 377.

(6) Not reported; tried at the Central Criminal Court in 1888 before Hawkins, J. The defendants were convicted, and the learned judge, after considering the question whether he should state a case for the consideration of the Court for Crown Cases Reserved, refused to do so, stating his reasons.

(7) 24 Q. B. D. 529.

MATHEW, J. Our judgment must be that the case be remitted to the magistrate. The question raised turns on s. 3 of the Act for the Suppression of Betting Houses (16 & 17 Vict. c. 119). The facts stated in the case shew that the respondent was the occupier of a beerhouse, and that he knowingly permitted a bookmaker to come into the tap-room and use the room for the purpose of betting with persons who frequented the beerhouse. The question is whether on these facts there should be a conviction. It is contended on behalf of the respondent that he is not liable to be convicted unless the bookmaker occupied a fixed part of the room, and that, as the room was used by other persons as well as the bookmaker, the latter did not occupy any fixed and ascertained spot, and therefore did not use any place for the purpose of betting within the meaning of the statute. But the section in question contains the word "room" as well as the word "place," and there is no provision that the room or place must be used exclusively for betting. In order to render the bookmaker liable to be convicted it is enough to shew that he was in a room for the purpose of inviting people to come and bet with him. That being so, what is the position of the occupier of the house, who permits the bookmaker to act in this way? I am of opinion that he is liable to be convicted, and there is no decision which is at variance with this view. It was urged that the decision in *Whitehurst* v. *Fincher* (1) was an authority in favour of the respondent in the present case, but in that case all that was found against the respondent, who was charged with using a room for the purpose of betting, was that three times he went to a public-house and made bets. Under such circumstances the Court was unable to come to the conclusion that the room was used for the purpose of betting within the meaning of the Act, for if it had been intended to make all betting in public-houses illegal the Act would have contained an express provision to that effect. In the present case, on the other hand, the betting was not casual, but the room was constantly and systematically used by a professional bookmaker for the purpose of betting with persons resorting thereto.

(1) 54 J. P. 565; 62 L. T. (N.S.) 433.

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A. L. SMITH, J. The facts stated in the case shew that the respondent was the landlord of a beerhouse, and that he was present and allowed betting to be carried on in the tap-room, and a betting man and his clerk were there on five different days and made bets. The first question to be considered is, what is unlawful betting? It is well settled that all betting is not unlawful. The Act under which the question in the present case arises was intended to put down betting houses, and to suppress the operations of those persons who keep what may be described as banks for the purpose of inducing other persons to come and bet with them. A penalty is imposed by s. 3 for knowingly and wilfully permitting, among other things, a room to be used for the purpose of betting with persons resorting thereto. It is contended that in the present case the bookmaker did not occupy any place or any fixed and ascertained spot, and therefore that no offence was committed by the respondent. But s. 3 applies to a "room" as well as a "place," and it is clear that the bookmaker used the room. There is no case which shews that, if a room is used for betting, to make the person so using it liable he must occupy some fixed and ascertained spot in the room. I am of opinion that *Snow* v. *Hill* (1) has no application to the present case. I entirely adhere to our decision in that case, but it is altogether different from the present case, because there the question was as to the use of a place for betting, whereas here the evidence shews that the bookmaker used the tap-room of the beerhouse for the purpose of betting with persons resorting thereto, and the landlord knowingly and wilfully permitted him so to use it.

For these reasons I am of opinion that the respondent ought to have been convicted.

Case remitted.

Solicitors for appellant: *Wontner & Sons.*

Solicitors for respondent: *Maitlands, Peckham & Co.*

(1) 14 Q. B. D. 588.

P. B. H.

HARGREAVE *v.* SPINK AND ANOTHER. 1891

Sale of Goods—Market Overt—Custom of City of London—Sale to Shopkeeper. *Oct.* 25, 26; *Nov.* 2.

Jewels were sold to a jeweller in the City of London in a show-room over his shop, to which customers were only admitted by special invitation:—

Held, by Wills, J., that the sale was not a sale in market overt.

Semble, per Wills, J., that the custom of market overt in the City of London does not apply where the shopkeeper is the purchaser, not the seller of the goods.

CASE tried before Wills, J. The facts and arguments are stated in the judgment.

Cock, Q.C., and *G. Elliot*, for the plaintiff.

Channell, Q.C., and *Pollard*, for the defendants.

Cur. adv. vult.

1891. Nov. 2. WILLS, J. The plaintiff, a married lady, was the owner of a quantity of jewellery, which, for the purposes of this case, must be taken to have been stolen from her. The defendants are silversmiths and jewellers. They bought the jewellery bonâ fide from a person who brought it to their business premises for sale, and under circumstances which would entitle them to keep the stolen property if the sale to them was made in market overt; and it is only right to say that, upon learning by an advertisement that the property was alleged to have been stolen, they gave immediate information to the plaintiff of every circumstance connected with their purchase. No prosecution has taken place. The plaintiff sues for the return of her jewels.

The defendants' place of business is within the City of London. It consists, inter alia, of a shop in the ordinary acceptation of the term, with a shop-window in which goods are exposed for sale. Inside the shop, jewellery is publicly exposed for sale, and there are the ordinary means of access to the street by a door, by which any person can enter. Behind the counter is a door out of the shop, opening upon the foot of a staircase, which leads to a show-room on the first floor. The person who brought the jewellery for sale explained her business, and was

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thereupon taken behind the counter and into the upper room, where the purchase by the defendants was effected.

Out of London the shop itself would not be market overt, but by the custom of London "every shop in which goods are exposed publicly to sale is market overt for such things only as the owner professes to trade in." These are the words in which Sir William Blackstone states the custom. (1) Lord Coke says, "Every shop in London is a market overt for such things only which by the trade of the owner are put there to sale," and he adds, "when I was Recorder of London, I certified the custom of London accordingly." (2) If, therefore, the sale had been *by* the defendants and in the shop itself, there could have been no doubt. In the present case, however, the sale was effected in the show-room upstairs, to which access could only be obtained by the permission and invitation of the defendants, and which was as essentially a private place as any convenient room in a private house. It seems to me that by no reasonable stretch of language can the show-room, to be approached only by passing behind the counter in the shop, and with the permission of the defendants or of their servants in the shop and behind the counter, be called a shop. A show-room of this description and so approached is certainly not in ordinary parlance a shop; and I see no reason for such an extension—if I should not more properly say perversion—of the natural and ordinary meaning of the word. It is impossible, upon a careful perusal of the scanty authorities upon the subject, not to see that there is a certain element of publicity required in the transaction to bring it within the principle of a sale in market overt. Lord Coke, in the case referred to, says that the reason of the case is common to the custom of London and to the general law of the land as to market overt. The market to be a market overt must be an "open public and legally constituted one": *Lee* v. *Bayes*, per Jervis, C.J. (3) The shop in London must be one in which goods are openly sold; that is, as I take it, when they are sold in the presence and sight of any one of the public who may come into the shop upon legitimate occasion. The keeping

(1) 2 Bl. 449.

(2) The case of Market Overt, 5 Rep. 83 b.

(3) 18 C. B. 599, at p. 601.

shop is an invitation to any one who chooses to come to deal with the shopkeeper to enter. No one could be said to be a trespasser who came in with the bonâ fide intention of buying the wares exposed for sale. In the case of a show-room situated as that in the present case, there is no such invitation, and it is very certain that no one would be allowed to go behind the counter and up the stairs unless permission was specially given, or unless he was an habitué of the place and had a general permission to go there.

Such a distinction is, as it seems to me, entirely in consonance with the authorities. Blackstone speaks of a shop wherein goods are exposed "*publicly*" (1) for sale. Lord Coke says, "If the sale had been *openly*" in the shop, "so that anyone who stood or passed by the shop might see it, there it would change the property" (2); and again, "If the sale be in the shop of a goldsmith, either behind a hanging or behind a cupboard upon which his plate stands, so that one who stood or passed by the shop could not see it, it would not change the property. So if the sale be not in the shop, but in the warehouse or other place of the house, it would not change the property, for that is not in market overt." (2) In the report of the same case in Cro. Eliz. 454 it is said, "If the sale be in a back shop, or other place not open, no property passes." The same case is rather more fully reported in Sir Francis Moore, where it is said, "Where a shop contains an outer room and an inner room, the sale in the inner room does not alter the property. So, where a curtain is drawn in the shop, the sale made in such a shop in that part which is more remote from the street, provided that the curtain is between the place where the sale is made and the street, it is not a good sale to alter the property as against the owner." (3) "A sale in market overt," says Mansfield, C.J., in *Hill* v. *Smith* (4), "requires that the commodity should be openly sold and delivered in the market." In *Lyons* v. *De Pass* (5) the question put to the jury was whether the place of sale was an "*open* shop." An "open shop" is the expression used by

(1) 2 Bl. 449.
(2) 5 Rep. 83 b.
(3) Moore, 360 (under the name of the *Bishop of Worcester's Case*).
(4) 4 Taunt. 533.
(5) 11 A. & E. 326.

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Cresswell, J., in *Lee* v. *Bayes*. (1) Shops, it is true, are not now exactly what they were, structurally and in many other respects, in the time of Queen Elizabeth. But the distinction between the "back shop or other place not open" and the regular shop, to which any respectable person would be admitted as a matter of course, is as sharp now as then, and the show-room upstairs, with the approach I have described, seems to me to answer precisely to the description of a "place not open."

I think, therefore, that the sale in the present case did not alter the property, and the plaintiff is entitled to succeed.

This view makes it unnecessary to decide the question whether the shop in London is a market overt for goods of a class usually bought therein as well as sold—a question of very considerable difficulty. The custom as stated by Lord Coke is that the shop is market overt "for such things only which by the trade of the owner are *put there* to sale." Blackstone says, "Every shop in which goods are exposed publicly to sale is market overt for such things only as the owner professes to trade in," i.e., the owner of the shop. When a casual person having jewellery for sale goes into a jeweller's shop to sell it, if he can, to the jeweller, it seems to me that his goods so offered for sale to the one person who is carrying on business in that shop are neither "put there to sale" nor "exposed publicly to sale," expressions which seem to me to point to goods placed in the shop by or with the consent of the shopkeeper for sale to all comers prepared to buy. These two passages appear to me to be the best and most authoritative statements of the custom itself. In the report of the *Bishop of Worcester's Case* (2) the expression is used, "A goldsmith's shop, where plate is usually bought and sold," but I do not think he means anything more than "bought by the customer and sold by the shopkeeper." Lower down, in the statement of the custom put into the mouth of the town clerk, and which the Court held to be unreasonable and bad, it is said, "Every shop shall be a market for everything saleable, although it be a shop not usual nor used for the sale of the things bought" (2), shewing clearly that in the statement of the custom there was no intention to use language applicable to purchases

(1) 18 C. B. 601.

(2) Moore, 360.

effected in the shop by the shopkeeper. It is said that in *Taylor* v. *Chambers* (1) no objection was taken to the application of the custom to a purchase at a shop as well as to a sale. But there the custom was pleaded in terms such that it is at least doubtful whether the objection could have been taken on demurrer, which was the form in which the question there decided was raised. Upon other grounds it was held that the custom was stated so broadly as to be unreasonable. It is said that in *Lyons* v. *De Pass* (2) the point might have been taken, but was not taken. That is, no doubt, true; but to treat that as an authority would be to treat the silence of the learned counsel in that case (the name of one only of them being ascertainable from the report) as equivalent to an authority that there was nothing in the point not made or discussed, a proposition which will not bear statement. In *Crane* v. *London Docks Co.* (3), of which the fullest report is in the *Law Journal*, the proposition that the protection extended to sales *to* the shopkeeper in his own shop as well as to sales *by* him, was discussed but not decided. The existence of such a privilege was, as Mr. Benjamin puts it, "strongly questioned" (Benjamin on Sales, 2nd ed. p. 9). Cockburn, C.J., says: "It is, I own, to be observed, that several cases have occurred in which the question of market overt has been raised, and in which sales have taken place in the shop of the purchaser; but this point was not, though it might have been, raised in these cases. Of course, that leads to the presumption, the matter having been brought before other judges by very able counsel, that the point is not a tenable one. Yet but for that, I think it is a proposition of very considerable difficulty and nicety." (4) I think the learned Lord Chief Justice overstates the case against the view to which he was obviously inclined. I can find only the two cases already cited, *Taylor* v. *Chambers* (1) and *Lyons* v. *De Pass* (2), which suggest this particular question, and in *Taylor* v. *Chambers* (1), as I have already shewn, the statement of the custom could hardly have been demurred to. It would have been a question of evidence,

(1) Cro. Jac. 68.
(2) 11 A. & E. 326.
(3) 5 B. & S. 313; 33 L. J. (Q.B.) 224.
(4) 33 L. J. (Q.B.) 227.

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had a trial taken place. I have shewn that Lord Coke's statement of the custom, as certified by himself when Recorder of London, contains expressions inconsistent with such an application of the custom. (1) Blackburn, J. (2), suggests that the question may be whether sales *to* the shopkeeper as well as by him, in his own shop, are according to the usage of the particular trade. If that be so, there is satisfactory evidence in this case that such a sale is according to the usage of the trade. But I can find no other authority for the proposition, and it does not seem to be a necessary corollary of the principle that the goods dealt in must not be "improper and foreign to the owner or trade *of the shop:*" Com. Dig. Market (E).

The most important argument that I have been able to discover in favour of the contention that the privilege extends to sales in a shop *to* the shopkeeper is founded upon the statute 1 Jac. 1, c. 21, s. 5. That Act recites that divers persons had set up as brokers, claiming to be "freemen of the City of London or inhabiting in Westminster, where they pretend to have the like overt market as in the City of London . . . being the very means to embolden all kinds of bad persons to rob and steal and unlawfully come by good men's goods, knowing that no sooner the same goods be stolen or unlawfully come by but that they may presently sell and pawn the same to such kind of new upstart brokers for ready money," and for remedy enacts that "no sale or pawn of any goods wrongfully taken or stolen from any person, and which at any time shall be sold, pawned, or done away within the City of London," or within certain other specified limits, "to any broker or pawntaker shall work any change of the property of and from any person from whom the goods were or shall be wrongfully taken, robbed, or stolen;" an enactment which, it may be contended, would not have been passed if it had not been felt that there might at all events be a serious question whether the custom of overt market of the city did not cover sales *to* as well as *by* the shopkeepers. The argument would be worth more if the statute did not apply in terms to the case of goods pawned or mortgaged as well as sold, whereas there is no ground for saying that it has ever been attempted to extend the custom

(1) 5 Rep. 83. (2) 33 L. J. (Q.B.) 229.

to goods pledged or mortgaged as well as sold, and it looks as if the legislature of that day was merely determined to take away from the class of people described in such vigorous terms all excuse for even raising the question that the custom protected their dealings. The Act has in construction been confined to pawnbrokers, and therefore does not apply in the present case. While, therefore, there is undoubtedly something to be said on either side of the question, the weight of the argument from principle seems to me to incline against such sales. It can hardly be doubted that in early times, when the custom grew up, as in later times, a shop was very much more often used by the shopkeeper for selling only, and that there would not be many trades except a goldsmith's where goods would be at all likely to be brought to the shop and there purchased by the shopkeeper. The custom is a general one applicable to all sorts of shops, and it might therefore be expected naturally to deal only with a state of things common to at least the great majority of shops. Sales effected in a shop *to* a shopkeeper seem to me to stand upon a footing differing in many substantial respects from sales *by* the shopkeeper, and some of the reasons which have been given to explain how the doctrine of market overt grew up certainly do not apply with the same force to the case of sales *to* the shopkeeper as they do to the case of sales *by* the shopkeeper. The circumstances of this case afford a good illustration of some of these differences. A sale by a shopkeeper is a sale by a person who can be found if wanted, and about whom inquiries can be made. Having a certain more or less permanent status of some degree, often a very high degree, of substantiality and respectability, he stands upon a very different footing from a casual and unknown person who comes into the shop. He, also, is an accessible source of information as to the channel through which the goods reached him. The casual stranger from whom he buys goes away, and perhaps can never be found again.

The inclination of my opinion is certainly against such an extension of the custom as the defendants contend for. The custom of London relied upon is in derogation of the common law, and therefore those who rely upon it have to make it out. The case in Cro. Jac. shews that at least nearly 300 years back

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the precise question now under discussion very nearly arose, and the circumstances which give rise to it must have occurred over and over again. The application of the custom to sales *by* the shopkeeper is abundantly clear, and no question since the time of Queen Elizabeth has arisen as to whether this by far the largest class of sales was within it. It is impossible to say that its application to sales *to* the shopkeeper is or has been equally free from doubt, and therefore the want of any case in which there has been a certificate or decision in favour of such an extension of the custom is, I think, very much against it.

However, it is not necessary to decide the question. Upon the other ground, that the place where the sale was effected was not a *shop*, I think it is clear that the plaintiff must have judgment.

The result is unfortunate for the defendants; but they have themselves to a great degree to blame for it. An unknown person was dealt with, and articles purchased from her of great value. Before she left the shop she was known to have given an address which was not what any one asking for her address under such circumstances would have expected to get, and not, I should say, one the purchaser ought to have been satisfied with. She then gave an address in Yorkshire, which might easily have been verified. A crossed cheque was given, properly enough, but four days afterwards exchanged for an open one. I cannot help thinking that, especially after the incident about the address in Hyde Park Place, ordinary prudence should have dictated the easy precaution of consulting a Yorkshire Directory, no very difficult thing to find in the City of London. If this had been done, the cheque would have been stopped, and no loss would have occurred to any one. It may be true, as was said, that ladies often sell their jewels, and are very loth to disclose their names; but that seems to me no good reason for the omission to observe ordinary precautions. To give an open cheque to an unknown person, well-dressed and of ladylike manners, for 550*l.* worth of jewellery, is to offer dangerous facilities for irregular transactions. To give a crossed cheque in the first instance, to make no attempt to verify the address given under circumstances which certainly might have been expected to have stimulated inquiry, and then

to change the crossed for an open cheque without further inquiry, would, I think, seem to most persons a very incautious way of doing business. The plaintiff must, of course, have her costs.

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Judgment for the plaintiff.

Solicitors for plaintiff: *Iliffe, Henley, & Sweet.*
Solicitors for defendants: *Stones, Morris, & Stone.*

H. D. W.

IN RE THE LOCAL GOVERNMENT ACT, 1888. EX PARTE THE LONDON COUNTY COUNCIL.

Nov. 4.

Local Government—County Councils—Coroner—Liberty—Right of Appointment—Transfer—Local Government Act, 1888 (51 & 52 *Vict c.* 41), *ss.* 3, *sub-ss.* (x.), (xi.), 5, 59.

The right of appointment of coroners acquired by the county councils under the Local Government Act, 1888, is confined to the appointment of coroners for counties who, prior to the passing of that Act, were elected by the freeholders of the county in pursuance of a writ de coronatore eligendo, and does not extend to the appointment of coroners for liberties or other franchises who were previously appointed by the lord of the franchise or otherwise than by election of the freeholders.

CASE stated for the decision of the Court, under s. 29 of the Local Government Act, 1888.

"1. Prior to the coming into operation of the Local Government Act, 1888, one T. W. Ratcliff was Steward of the Court of Record holden by prescription in and for the Fortress and Palace of the Tower of London and the Liberties thereof.

"2. Upon the coming into operation of the Local Government Act, 1888, the said Fortress and Palace of the Tower of London and the Liberties thereof, became and were situate wholly within the administrative county of London.

"3. The said T. W. Ratcliff was appointed in the year 1859 to be Steward of the said Court of Record of the Liberty of the said Tower of London by the then Chief Governor or Constable of the said Tower of London, Lord Combermere. By a Charter of King James the 2nd, dated the 10th June, 1687, it was provided that the steward of the said Court should be ex-officio coroner within the said Liberty, and should have full power and authority to do and execute all such matters and things within the said precincts

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and Liberty which to the office of coroner did of right appertain, having first taken the usual oath for the execution of such his office before the Chief Governor of the said Tower of London then and for the time being.

"4. The said T. W. Ratcliff continued to do and execute all such matters and things appertaining to the office of coroner within the said precincts and Liberty, until the coming into operation of the Local Government Act, 1888, which in the Metropolis came into operation on the 1st day of April, 1889.

"5. The said T. W. Ratcliff and his predecessors in office were paid a fee for each inquest in respect of their services as such coroners aforesaid out of a rate known as the Liberty rate, which was levied within the said Liberty of the Tower. The said rate was in the nature of a county rate, and was levied and allowed by the justices of the peace for the said Liberty of the Tower. The said Liberty was not subject to the jurisdiction of the justices or quarter sessions of the county of Middlesex or city of London. The said Liberty has always had a separate Court of Quarter Sessions and a separate commission of the peace, and being exempt from the jurisdiction of the courts of quarter sessions for the city of London and the county of Middlesex, the Liberty was also exempt from the county rates made for the said county of Middlesex and city of London respectively, and from other rates made by the courts of quarter sessions respectively, and the said Liberty did not contribute to the said county and other rates.

"6. Shortly after the coming into operation of the Local Government Act, 1888, the said T. W. Ratcliff died."

The questions for the opinion of the Court were:—

"(1.) Whether or no the steward for the time being of the Court of Record for the Fortress and Palace of the Tower of London and the Liberties thereof is, since the coming into operation of the Local Government Act, 1888, coroner for the said Liberty, and entitled to exercise within the precincts of the said Tower of London and the Liberties thereof, the duties appertaining to the office of coroner.

"(2.) Whether the coroner for the county of London has jurisdiction to exercise the duties of coroner within the said Liberty of the Tower.

"(3.) Whether or no the London County Council has now the right to appoint a coroner to exercise within the precincts of the said Tower of London and the Liberties thereof the duties appertaining to the office of coroner."

Finlay, Q.C., and *English Harrison*, for the London County Council. It is admitted by the case that the liberty of the Tower forms part of the County of London, and it is contended that it is merged in that county for all purposes, including that of the appointment of a coroner. Formerly the coroner for the liberty was paid out of a liberty rate allowed by the quarter sessions of the liberty, but the quarter sessions of the liberty, and with them the liberty rate, have now been extinguished by the Local Government Act, 1888, and it is improbable that the legislature intended to leave the liberty a barren right of appointing a coroner whom they had no longer any power to remunerate. By s. 3 of that Act, "There shall be transferred to council of each county . . . the administrative business of the justices of the county in quarter sessions assembled, that is to say, all business done by the quarter sessions or any committee appointed by the quarter sessions in respect of the several matters following, namely, (x.) The appointment, removal, and determination of salaries of the county treasurer, the county surveyor, the public analysts, any officer under the Explosives Act, 1875, and any officer whose remuneration is paid out of the county rate." The case finds that the liberty rate, out of which the coroner for the liberty of the Tower was paid, was in the nature of a county rate. He was therefore an "officer whose remuneration was paid out of the county rate" within the meaning of sub-s. (x.), and the right of appointing him was transferred by that section to the London County Council. Again, by s. 59, sub-s. (2), it is enacted that, "A place which is part of an administrative county for the purposes of this Act shall . . . . form part of that county for all purposes, whether sheriff, lieutenant, custos rotulorum, justices, militia, coroner, or other."

Sir R. Webster, A.G. (*H. Sutton*, with him), for the Governor of the Tower. The question raised is of general importance, and applies not merely to the coroner for this particular liberty of the

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Tower, but to all coroners for liberties or franchises throughout the country, who were formerly appointed otherwise than by election of the freeholders. Sub-s. (x.) of s. 3 must be read as qualified by the general words at the beginning of the section, as to the transfer of the administrative business of the quarter sessions, that is to say, the appointment of officers whose remuneration is paid out of the county rate is transferred to the county council only in so far as such officers were formerly appointed by the quarter sessions. But the coroner for the liberty was never so appointed; he was always appointed by the Governor of the Tower. Again sub-s. (xi.) of the same section, which specifically transfers to the county council the business connected with "the salary of any coroner whose salary is payable out of the county rate," would be wholly superfluous if sub-s. (x.), which deals with the "determination of salaries," as well as the appointment of officers, applied to such an officer as a coroner. The only section of the Act by which the county council acquire the right of appointing any coroners is s. 5, by which, "After the appointed day a coroner for a county shall not be elected by the freeholders of the county, and on any vacancy occurring in the office of a coroner for a county who is elected to that office in pursuance of a writ de coronatore eligendo, a like writ for the election of a successor shall be directed to the county council of the county instead of to the sheriff, and the county council shall thereupon appoint a fit person . . . And any person so appointed shall have like powers and duties, and be entitled to like remuneration, as if he had been elected coroner for the county by the freeholders thereof." But that section is confined to the case of county coroners who were formerly elected by the freeholders, and its object was to avoid the enormous expense attending that mode of election; it does not touch the case of a liberty coroner who was appointed otherwise than by the freeholders. This distinction between county coroners and liberty or franchise coroners has always been maintained in the various Acts relating to coroners, see 7 & 8 Vict. c. 92, s. 27, and 50 & 51 Vict. c. 71, s. 30, sub-s. (3).

With regard to s. 59, the county council cannot rely on the general words of that section as indicating an intention to deal

with such a very special matter as the transfer to them of the appointment of a liberty coroner. Had any such transfer been intended there would have been a section expressly dealing with the matter, corresponding to s. 5, which expressly deals with the transfer of the appointment of county coroners.

English Harrison, in reply.

DAY, J. The question which we have to determine in this case is whether the London County Council have acquired the right to appoint a coroner for the liberty of the Tower of London, or whether the right to appoint such coroner remains vested in the Governor of the Tower under the provisions of the charter of James II. If the County Council have acquired such a right it must be by virtue of the Local Government Act, 1888, and certain sections of that Act have been relied on by their counsel as shewing that the right of appointment has been transferred to them. The first section relied on was s. 3, which provides that "there shall be transferred to the council of each county . . . . the administrative business of the justices of the county in quarter sessions assembled . . . . namely" (inter alia) sub-s. (x.), "the appointment . . . . of any officer whose remuneration is paid out of the county rate." And it was contended that inasmuch as the remuneration of the coroner for the liberty of the Tower was, as the case finds, paid out of a rate in the nature of a county rate, his appointment was transferred to the County Council. But the Attorney-General was quite right in saying that the language of sub-s. (x.), which if it stood by itself might possibly operate to transfer the right of appointment of the coroner to the Council, must be read as qualified by the language at the head of the section and not as extending it; and by the general words at the head of the section the only business that is transferred by the section is the administrative business of the quarter sessions. But it was never part of the business of the justices in quarter sessions to appoint a coroner anywhere; it was part of their business to provide for the payment of his salary, but not to appoint him. A coroner, therefore, is not one of the officers referred to in sub-s. (x.), and the County Council cannot rely on that section as shewing a

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transfer to them of the right of appointment. Another section relied on was s. 59, which says that "a place which is part of an administrative county for the purposes of this Act shall . . . . form part of the county for all purposes, whether sheriff, lieutenant, ... coroner, or other." But that merely means that it shall form part of such county for the exercise therein of their respective offices by the officers there named; the section cannot be treated as intended to affect the question of the coroner's appointment.

GRANTHAM, J. I am of the same opinion. It had been generally felt for a long time prior to the passing of the Local Government Act, 1888, that the mode of appointment of county coroners, namely by election by the whole body of the freeholders, was highly undesirable as being most cumbersome and expensive; and that mode of appointment would, no doubt, have been altered by the Coroners Act, 1887, 50 & 51 Vict. c. 71, had it not been known that a Local Government Bill for the creation of county councils was going to be introduced in Parliament the following year, and considered advisable to wait until the councils were established and then to transfer the appointment of such county coroners to them. Accordingly, by s. 11 of the Coroners Act, 1887, it was provided that "a coroner for a county shall continue to be elected, until Parliament otherwise directs, by the freeholders." And in the following year Parliament did "otherwise direct" by s. 5 of the Local Government Act, and provided that where a coroner was theretofore elected by the freeholders, he should in future be appointed by the county council. But there the alteration of the law as regards the appointment of coroners stopped, and reasonably so, for the objection to the existing mode of appointing county coroners had no application to the case of franchise coroners.

Decision accordingly. (1)

Solicitor for London County Council: *W. A. Blaxland.*

Solicitor for Governor of the Tower: *Solicitor to the Treasury.*

(1) The Court did not specifically answer the questions submitted to them, but the form of the answers was agreed between the parties.

J. F. C.

THE QUEEN *v.* MORTON.

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Nov. 7, 9, 10.

Municipal Corporation—Election—Disqualification—Election of Alderman—Chairman voting for himself—Casting vote given in his own favour—Mode of questioning Election—Quo Warranto—Petition—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss* 60, 87, 225.

At an election of an alderman for a borough there were two candidates, one of whom was the mayor. The mayor presided and voted for himself, which caused an equality of votes. He then gave the casting vote in his own favour, and declared himself elected.

On application for a quo warranto to question his right to act as alderman:—*Held*, that, assuming that he was improperly elected, the case was one in which either the person whose election was questioned was at the time of the election disqualified, or he was not duly elected by a majority of lawful votes, within the meaning of s. 87 of the Municipal Corporations Act, 1882, and in either view the election could not be questioned except by an election petition, and quo warranto would not lie.

A RULE NISI for an information of quo warranto had been obtained, calling on Mr. Morton, mayor of the borough of Chelmsford, to shew by what authority he exercised the office of an alderman of that borough. (1)

The facts, so far as material, were as follows:—

On the 9th of November, 1890, an election of an alderman for the borough of Chelmsford was held at the meeting of the council, in pursuance of the Municipal Corporations Act, 1882. (2)

(1) The proper course would have been to serve notice of motion (see Crown Office Rules, 1886, rules 51–59), but the objection was not pressed.

(2) 45 & 46 Vict. c. 50:—

By s. 60: "(1.) The ordinary day of election of aldermen shall be the 9th of November, and the election shall be held at the quarterly meeting of the council.

"(2.) The election shall be held immediately after the election of the mayor, or, if there is a sheriff, the appointment of the sheriff.

"(3.) An outgoing alderman, although mayor elect, shall not vote.

"(4.) Every person entitled to vote may vote for any number of persons not exceeding the number of vacancies, by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes.

"(5.) The chairman, as soon as all the voting papers have been delivered to him, shall openly produce and read them, or cause them to be read, and then deliver them to the town clerk to be kept for twelve months.

"(6.) In case of equality of votes

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Mr. Morton, who was mayor of the borough, acted as chairman. There were two candidates, of whom Mr. Morton was one, the other candidate not being a member of the council. Mr. Morton, holding the view that the aldermen ought to be chosen from among the members of the council, voted for himself. The result was an equality of votes, whereupon Mr. Morton gave the casting vote in his own favour, and declared himself elected.

1871. Nov. 7, 9. *Channell, Q.C.* (*Macmorran*, with him), shewed cause. Assuming for the sake of argument, that the effect of what the mayor did would be to disqualify him from holding the office of alderman, it is clear from the language of the Municipal Corporations Act, 1882, and from the decisions, that the wrong remedy has been adopted, for the case comes within the terms of s. 87 of the statute, and therefore the only remedy available is by election petition, and quo warranto does not lie.

Philbrick, Q.C., and *H. C. Richards*, in support of the rule. The only clauses in s. 87 which could have any application are (*c.*) and (*d.*), but those clauses only apply to cases of personal disqualification, whereas here the action of the mayor (who in effect acted as judge in his own cause) rendered the election void ab initio at common law, and it can be questioned by quo warranto.

[As no decision was given on any of the other points discussed, the rest of the argument is omitted.]

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the chairman, although as an outgoing alderman or otherwise not entitled to vote in the first instance, shall have the casting vote.

"(7.) The persons, not exceeding the number of vacancies, who have the greatest number of votes, shall be declared by the chairman to be, and thereupon shall be, elected."

By s. 87: "(1.) A municipal election may be questioned by an election petition on the ground—

* * * *

"(*c.*) That the person whose election is questioned was at the time of the election disqualified; or

"(*d.*) That he was not duly elected by a majority of lawful votes.

"(2.) A municipal election shall not be questioned on any of those grounds except by an election petition"

By s. 225: "(1.) An application for an information in the nature of a quo warranto against any person claiming to hold a corporate office shall not be made after the expiration of twelve months from the time when he became disqualified after election."

The following authorities were referred to:—*Reg.* v. *Vestrymen and Churchwardens of St. Pancras* (1); *Reg.* v. *M'Gowan* (2); *Reg.* v. *Dudley* (2); *Reg.* v. *Maddy* (2); *Reg.* v. *Stanley* (2); *Reg.* v. *Owens* (3); *Reg.* v. *White* (4); *Fanagan* v. *Kernan* (5); *Pritchard* v. *Mayor, Aldermen and Citizens of Bangor.* (6)

Cur. adv. vult.

1891. Nov. 10. A. L. SMITH, J. In this case a rule nisi for an information of quo warranto had been obtained, calling on Mr. Morton, mayor of the borough of Chelmsford, to shew by what authority he exercised the office of an alderman of that borough. Divers reasons are mentioned in the rule why Mr. Morton should not do so, but the real substantial ground which alone exists is that Mr. Morton, whilst sitting and acting as chairman of a meeting of the council for the election of an alderman, pursuant to s. 60 of the Municipal Corporations Act, 1882, voted for himself, and also gave the casting vote in his own favour, whereby he became elected to the office. It was argued, in shewing cause against the rule, that a proceeding by way of quo warranto would not lie by reason of the provisions of ss. 87 and 225 of the Municipal Corporations Act, 1882. [The learned judge read these sections.] It was said that these two sections of themselves did away with proceedings by way of quo warranto excepting in cases of disqualification arising after election, and a passage in the judgment of Lord Halsbury in *Pritchard* v. *Mayor of Bangor* (6) was read in that behalf. Apparently s. 73 of the Act of 1882 was in that case not dealt with. It is not necessary to hold, and I do not hold, that in no case will proceedings by way of quo warranto lie excepting in the case of disqualification arising after election. It is, however, clear that proceedings by way of quo warranto are abolished by the 87th section of the Act of 1882 in cases which come within that section, or, in other words, where a petition will lie, quo warranto will not. The question is, does the present case fall

(1) 11 A. & E. 15.
(2) 11 A. & E. 869.
(3) 2 E. & E. 86.
(4) Law Rep. 2 Q. B. 557.
(5) 8 Law Rep. (Ireland) 44.
(6) 13 App. Cas. 241 (affirming the decision of the Court of Appeal in *Reg.* v. *Mayor and Corporation of Bangor* 18 Q. B. D. 349).

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within either sub-s. (*c.*) or (*d.*)? for if it does the rule must be discharged. It has been held, before election petitions were made applicable to municipal elections, by authority the accuracy of which no one could doubt, that upon the election of town councillors a returning officer cannot return himself, and that, if he does, upon quo warranto the officer would be ousted: *Reg.* v. *Owens* (1859) (1), and *Reg.* v. *White* (1867) (2). The ratio decidendi of these cases is that a man cannot be a judge in his own cause. Mr. Philbrick, in support of the rule, argued that the election was void ab initio, and insisted that even if in all other respects an election were in order, if the chairman voted for himself, though it did not affect the result of the election, another being elected by the majority of lawful votes, it vitiated the whole proceedings and that it must be held that there had been no election at all. He has produced no authority for that proposition, and I do not agree with it, and moreover, the case in the Irish Courts which he cited, *Fanagan* v. *Kernan* (3) is against him. There a petition was filed, not a proceeding by quo warranto, for an act similar to that now laid to the charge of Mr. Morton, and the Court, in giving judgment, certainly did not think that the election was void ab initio, and never doubted that it was a matter for which a petition would lie, and, moreover, discussed the question whether, if proper notice had been given to the electors of disqualification, the unsuccessful candidate could have been seated upon petition, a futile argument if the election itself was void ab initio. In my judgment there is no ground for saying that this election was void ab initio. Assuming, as I do, for the sake of the argument, that Mr. Morton was improperly elected because, acting judicially, he had returned himself, or, in other words, had acted as a judge in his own cause, in my judgment he can be unseated on the ground that he was disqualified from being elected, and the case comes within sub-s. (*c.*) of s. 87. If Mr. Morton was improperly elected because he had no right to give either of the votes which he did for himself, then he was not duly elected by a majority of lawful votes, and the case falls within sub-s. (*d.*) of s. 87, so that which-

(1) 2 E. & E. 86. (2) Law Rep. 2 Q. B. 557.

(3) 8 Law Rep. (Ireland) 44.

ever way you take the objection to Mr. Morton's election, in my judgment a petition would have lain, and consequently quo warranto will not. For these reasons the rule must be discharged with costs. I do not decide any other point discussed at the Bar.

MATHEW, J., concurred.

Rule discharged.

Solicitors for the prosecution: *Paterson, Snow, Bloxam & Kinder, for Gepp & Sons, Chelmsford.*

Solicitors for the defendant: *Whites & Co., for T. Dixon, Chelmsford.*

P. B. H.

THE QUEEN *v.* BLENKINSOP AND OTHERS.

Oct. 27.

Poor-Rate—Recovery of Arrears—Demand upon and Payment by Rate-Payer of less than Proper Amount of Rate—Recovery by succeeding Overseers of Unpaid Portion of Rate—Allowance in Account—Mistake of Law— 17 *Geo.* 2, *c.* 38, *s.* 11.

By s. 13 of the Public Libraries Act, 1855, the expenses of carrying the Act into execution in any parish are to be paid out of a rate to be made and recovered in like manner as a poor-rate, except that persons occupying certain specified kinds of land, not including land used for the purposes of a railway, are to be rated in respect of one-third only of the net annual value. A rate having been made in pursuance of that section a railway company occupying land in the parish were correctly rated in the rate-book at their full net annual value, but owing to a mistaken belief on the part of the overseers that the company had been incorrectly so rated, and that the land in question was within the exemptions in the Act, a demand note for one-third only of their full share of the rate was sent to the company, who paid no more than such third accordingly. In each of the three succeeding years, similar demand notes for one-third only were sent to and paid by the company, notwithstanding that they continued to be correctly rated in the rate-book at the full net annual value. In the fifth year the then overseers discovered the mistake, and sought to recover from the company the unpaid two-thirds for each of the four preceding years, as arrears under s. 11 of 17 Geo. 2, c. 38, by which it is provided that "in case any person shall refuse or neglect to pay to such overseers as aforesaid any sum of money that he shall be legally rated or assessed to, it shall be lawful for the succeeding overseers . . . . to levy such arrears":—

Held, that the money sought to be recovered was arrears within the meaning of the section, and that the overseers were not estopped from recovering it by reason of the delivery of the incorrect demand notes by their predecessors.

MANDAMUS to justices to issue distress warrant for arrears of rates.

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In the year 1883, the ratepayers of the parish of Wandsworth duly determined that the Public Libraries Act, 1855 (18 & 19 Vict. c. 70), should be adopted in their parish. By s. 13 of that Act "the expenses of carrying the Act into execution in any parish shall be paid out of a rate to be made and recovered in like manner as a poor rate, except that every person occupying lands used as arable, meadow, or pasture ground only, or as woodlands or market gardens, or nursery grounds, shall be rated in respect of the same in the proportion of one-third part only of the full net annual value thereof respectively." A rate was made under that section in the parish of Wandsworth for the first time in 1885. The London and South Western Railway Company, who occupied land in the parish, were for the purposes of such rate duly rated and assessed in the rate-book at the full net annual value of such land, but, upon a demand note being sent to them for the full amount of their proportion of the rate, they claimed to be liable for one-third only of the sum demanded, on the ground that the land in their occupation came within the exceptions in s. 13. The overseers acquiesced in their claim, and accordingly sent an amended demand note for one-third only of the sum legally due from the company, and the company paid such one-third and no more. In the years 1886, 1887, and 1888, similar library rates were made, and similar demand notes for one-third only of the proper sum were sent to and paid by the railway company, notwithstanding that in each of such years they were correctly rated in the rate-book at the full net annual value of their land, and in order to make the value column of the rate-book tally with the amounts actually collected, the two-thirds which had not been demanded of the railway company were entered in the rate-book as irrecoverable. The two-thirds of the library rate so remaining unpaid by the company amounted in all for the four years 1885–1888 to a sum of 223*l.* 18*s.* 8*d.* In the year 1889, the then overseers discovered the mistake which had been made by their predecessors, and demanded from the company payment of the said 223*l.* 18*s.* 8*d.*, which payment was refused. The overseers then summoned the company before the justices to shew cause why they should not pay, and demanded that a distress warrant should issue; but the

justices dismissed the summons on the ground that the parish authorities by sending under a mistake of law the incorrect demand notes for the one-third only had precluded themselves from thereafter recovering the remainder. The overseers having obtained a rule nisi for a mandamus to the justices to issue their warrant of distress,

E. Page, for the railway company, shewed cause. The money sought to be recovered does not consist of arrears within the meaning of s. 11 of 17 Geo. 2, c. 38. (1) That section only applies to a case where a sum of money has been in fact demanded and the ratepayer has not paid it. There can be no refusal or neglect where there has been no demand. And here the company paid all that was demanded of them. But, assuming that the money in question is arrears within the section, the justices were right in holding that the parish authorities were estopped from setting up that it was due. Suppose the company had paid the full three-thirds, and that the overseers had then refunded two-thirds under the belief that the company were not liable for more than one-third, they could not afterwards recover the two-thirds so refunded, for it would be money paid under a mistake of law with full knowledge of the facts. Yet no substantial distinction can be drawn between that case and this. The facts of the present case bring it within the rule of *Skyring* v. *Greenwood* (2), that money allowed in account under a mistake of law stands on the same footing as money paid under a mistake of law and cannot be recovered back; and what happened here was equivalent to an allowance in account. The reason of the estoppel in *Skyring* v. *Greenwood* (2) applies with equal force here, namely, that "every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man if, after having had credit

(1) By s. 11 of 17 Geo. 2, c. 38, it is enacted that "in case any person or persons shall refuse or neglect to pay any sum or sums of money that he, she, or they shall be legally rated or assessed to, it shall and may be lawful to and for the succeeding overseers and they are hereby required to levy such arrears and out of the money so levied to reimburse their predecessors all sums of money which they may have expended for the use of the poor, and which are allowed to be due to them in their accounts as aforesaid."

(2) 4 B. & C. 281.

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given him in account for certain sums, . . . he may be called upon to pay them back": per Abbott, C.J., at p. 289. The same hardship exists here, for the company have of course long since distributed the money in dividends among the shareholders.

[MATHEW, J. The case of *Skyring* v. *Greenwood* (1) goes to the full extent of the law. Moreover, here the debt was a public one which the overseers had no power to remit.]

Stroud, for the overseers, was not called upon.

MATHEW, J. I am clearly of opinion that the justices in refusing to issue their warrant in this case were wrong. It seems perfectly clear that these were arrears within the meaning of 17 Geo. 2, c. 38. Therefore the existing overseers were entitled to demand payment of them, and, upon the company refusing to pay, to apply to the justices for their warrant of distress. Mr. Page, on behalf of the company, has sought to avail himself of the authority of the well-known case of *Skyring* v. *Greenwood* (1), and has insisted that they must be taken to have acted on a representation made by the overseers as their creditors that the smaller sum was the full amount of their indebtedness. But the distinction between that case and the present is twofold; in the first place the liability of a ratepayer to pay his rates is not a mere private debt but a public obligation, and, secondly, there was here no representation whatever as to the extent of the company's liability beyond the fact that the overseers omitted to collect as much as they ought to have done. It was a mere omission and nothing more. Whether the company knew all along that they were liable to pay more than they actually did pay it is not necessary to inquire. The rule must be made absolute.

A. L. SMITH, J. I agree that the warrant ought to be issued. It was contended on behalf of the railway company that s. 11 of 17 Geo. 2, c. 38, has no application to this case because, no demand for payment of the two-thirds having been made during the currency of the several years for which the rates were respectively made, the company could not be said to have neglected or refused to pay the persons who held the office of overseers for

(1) 4 B. & C. 281.

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those years. But I cannot accede to that argument. The answer is that the demand could not be made until the mistake was discovered; and the moment it was discovered the money was demanded. Then it was said that the case came within the rule of *Skyring* v. *Greenwood* (1), that money allowed in account under a mistake of law cannot be recovered back, and that the non-demand of the two-thirds was equivalent to an allowance in account. But I do not think that this could in any sense be treated as an allowance in account. The money was not allowed; it was merely not claimed. I can see no reason why the money should not be paid.

Rule absolute.

Solicitor for the Churchwardens, &c., of Wandsworth: *G. W. Barnard.*

Solicitors for the London and South Western Railway Co.: *Bircham & Co.*

J. F. C.

JACOMB AND ANOTHER *v.* TURNER AND ANOTHER.

Oct. 29, 30; *Nov.* 2.

Inclosure Acts—Partition—Partition not incident to Inclosure—Effect of Award of Partition as regards Title to Lands allotted—Inclosure Act, 1845 (8 & 9 *Vict. c.* 118), *s.* 105—*Inclosure Act*, 1848 (11 & 12 *Vict. c.* 99), *ss.* 13, 14—*Commons Act*, 1876 (39 & 40 *Vict. c.* 56), *s.* 33.

The plaintiffs brought an action for the recovery of certain land as representatives of a person to whom the land had been allotted in severalty by an award of partition made under the Inclosure Acts in 1880. The defendants were in possession of the land, and at the date of the award had acquired a good title thereto under the Statute of Limitations, having been in undisturbed possession since 1851. The partition was not made under any inclosure scheme. None of the parties to the partition proceedings had any interest whatever in the land, and it was by mere mistake included in the schedule to their application and dealt with in the award:—

Held, by Collins, J., that the effect of s. 105 of the Inclosure Act, 1845 (8 & 9 Vict. c. 118), was not to make the award conclusive as to the title of the allottee, and that the award, not having been made on the application of persons interested in the land within the meaning of s. 13 of the Inclosure Act, 1848 (11 & 12 Vict. c. 99), had been made without jurisdiction, and that the defendants were therefore entitled to judgment.

CASE tried before Collins, J.

The facts and arguments are stated in the judgment.

(1) 4 B. & C. 281.

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JACOMB v. TURNER.

Sir H. Davey, Q.C., Asquith, Q.C., and *J. V. Austin*, for the plaintiffs.

Channell, Q.C., and *McIntyre*, for the defendants.

Cur. adv. vult.

1891. Nov. 2. COLLINS, J. This is an action for the recovery of land. The plaintiffs are the representatives of one William Jacomb, to whom the land in question was allotted in severalty by an order or award of partition purporting to be made under the Inclosure Acts, 1845 to 1870, and dated March 18, 1880. The partition was not made under any inclosure scheme. The defendants are in possession of the land in question, and at the date of the award had acquired a good title thereto under the Statute of Limitations, having been in undisturbed possession since 1851. None of the parties to the partition proceedings had any interest whatever in the land the subject of this action when such proceedings were instituted, and it was by mere mistake included in the schedule to their application and dealt with in the award. The question in the case is whether, under such circumstances, the award was effectual to displace the title of the defendants.

The plaintiffs contend that the award is conclusive by the express provisions of the Inclosure Acts, and that, consequently, on an application for partition, the object of which ex vi termini is to apportion parts in severalty among the different owners of undivided shares in the whole, it is competent for the commissioners to allot among the applicants land in which they had no undivided or other interest whatever, and thereby to defeat and displace the title of the true owner. This is at first sight a somewhat startling contention; but it was of course entirely within the legal power of the legislature so to enact, and *Walker* v. *Bentley* (1) as to merger of tithes, and *Rorke* v. *Errington* (2) as to a conveyance under the Incumbent Estates Act, were cited by Sir H. Davey to shew that it had in fact done so in cases which he suggested were in pari materiâ.

Whether the legislature has done so or not depends upon the

(1) 9 Hare, 629.

(2) 7 H. L. C. 617.

construction of the section referred to in the argument which I will now proceed to examine. Sir H. Davey rested the case for the plaintiff on s. 105 of the general Inclosure Act, 1845, which was made applicable by later legislation to awards made on application for the partition of land not the subject of inclosure. The general Inclosure Act deals first with allotment upon inclosure, then (ss. 90 and 92) with exchanges and partitions incident to inclosure, and later on (s. 147), with exchanges of land not the subject of inclosure. It did not deal with the case of partition of land not the subject of inclosure. That was dealt with, for the first time, by the third Amending Act, 1848, ss. 13 and 14, which provided for such partitions, and applied to them the provisions of the general Act as to exchanges; and by s. 33 of the Commons Act, 1876, s. 105 of the general Act, was made applicable thereto. Sect. 105 is as follows: "That such confirmation as aforesaid shall be conclusive evidence that all the directions of this Act in relation to such award, and to every allotment, exchange, partition, and matter therein set forth and contained, which ought to have been obeyed and performed previously to such confirmation, shall have been obeyed and performed; and no such award shall be impeached by reason of any mistake or informality therein, or in any proceeding relating thereunto, or on account of any notices or consents required by this Act, or on account of defects or omissions in any previous proceeding whatever in the matter of the inclosure; and every allotment, exchange, partition, direction, matter, and thing specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever." This section, applied, as I have above shewn, to a partition such as that in this case of land not the subject of inclosure, Sir H. Davey contended, made the award conclusive for all purposes. Mr. Channell, in a very able argument based upon an elaborate examination of the Acts, contended that the awards made under the Acts were not intended to be, and were not, conclusive as to title in the thing allotted. I am of opinion that this contention must prevail.

It does not seem to have been part of the scheme of the Inclosure Acts as it was of the Incumbered Estates Act to give Parliamentary titles. The commissioners act in the main through

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valuers not necessarily or primâ facie legal experts, and their chief business upon an inclosure is valuing—the assessing of equivalents. They are empowered to proceed on the application of persons interested (General Inclosure Act, 1845, s. 25), and the test of interest is actual possession "without regard to the real amount of interest" (s. 16). By s. 49 the jurisdiction to determine title is expressly withheld from them. In view of these provisions it would be difficult to contend that s. 105 made the award conclusive of that which the valuer had no jurisdiction to determine, viz., title, and Mr. Asquith, in reply, frankly admitted that he could not support such a contention as to awards made under an inclosure scheme, but he contended that different considerations applied to exchanges and partitions of land not the subject of inclosure. This admission, however, seems to me to be fatal to the only point made by Sir H. Davey in opening the case, viz., that subsequent legislation had brought awards in partition proceedings with respect to land not subject to inclosure within the ambit of the 105th section of the general Act, and that such awards were thereby made conclusive for all purposes against all persons. Reading s. 105 by the light of this admission we may substitute for the word "conclusive" the words "inconclusive as to title" or "conclusive except as to title," and it is of course obvious that with this qualification the application of the section to the award in question could not oust the title of the true owner. This would suffice to dispose of the case as Sir H. Davey left it. But Mr. Asquith in his closely reasoned reply contended that while this qualification of conclusiveness must be read into the section in the case of awards incident to an inclosure, it need not and ought not to be read into the section where applied to exchanges or partitions not incident to an inclosure. He urged that the qualification is not in the section itself, but has to be implied out of the other provisions dealing with the subject-matter of the award, and that, when the legislature deals with exchanges and partitions not incident to an inclosure, it enacts a new code with respect to them which is incompatible with the existence of such a qualification, or, at all events, does not compel us to read it in. He asked what the award was conclusive of in this case, if it was not conclusive as

to title, and pointed to the provisions as to notice and advertisements and veto by persons affected in s. 150 of the general Act and s. 14 of the Act of 1848, which he said would be idle unless it was intended to make the award conclusive as to title in the absence of such veto. I find no indication of such new code, and it would certainly be a remarkable result if the word "conclusive" in s. 105, which applies to every award made under the Act, has to be read in different senses according to the subject-matter of the award. The question "What is it conclusive of?" might be urged with equal force as to partitions incident to an inclosure, as to which Mr. Asquith admits that the qualification might be taken as read into the section. But the scheme of the Acts seems to me to be pretty plain. It first frames machinery for dealing with inclosures, and, incidentally, with exchanges and partitions; it is no part of this scheme that the title of persons taking allotments should be ascertained; it suffices that they shall hold the thing allotted with precisely as much title as they held that in respect of which the allotment was made. It is part of the scheme that that which the commissioners or valuers have jurisdiction to do should be done finally, and therefore they do finally ascertain equivalents, and the allotments, exchanges, and partitions cannot be undone or modified, except indeed by an application under s. 29 of the 6th Amendment Act, 1852, which does not, I think, affect this question. So much as to lands the subject of inclosure. The legislature then proceeds by a later section, s. 147, to bring exchanges of lands not the subject of inclosure within the ambit of the Act. It is true these are dealt with directly by the commissioners, while those under an inclosure are dealt with by the valuer subject to appeal, and it is not quite clear whether ss. 93 and 94 apply to both; see *Minet* v. *Leman*. (1) But as was said by the Master of the Rolls in that case, which was not cited in argument, "By the statute no valid title is conferred by such exchange, and if the title of the piece of land given in exchange is defective, that defect is transferred to the piece of land taken in exchange." This observation was perhaps not necessary to the decision, and is therefore only a dictum; but Turner, L.J.,

(1) 24 L. J. (Ch.) 545, at p. 548.

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appears to have agreed with it: see his judgment on appeal. (1) If it is well founded, it disposes of this case, as partitions of land not the subject of inclosure are dealt with by applying to them the provisions of the general Act as to exchanges. Even if I did not agree with it, I should pause long before deciding against the opinion of two such eminent authorities, but I do entirely agree with it. The machinery as to notice and veto relied upon by Mr. Asquith does not in my judgment militate against it, as there are undoubtedly some matters which will be finally decided by the award, and which it may be highly desirable for the true owner to veto, even though title is not conferred by the allotment.

These considerations would suffice to entitle the plaintiff to judgment. Mr. Channell, however, took a second point, viz., that the award was made without any jurisdiction as to the land in question. It is true that he did not put this point in the forefront of his argument, and I was at first disposed to think that Mr. Asquith had answered it. However, on a closer examination of the sections I am of opinion that it is a good point, and that the commissioners never acquired jurisdiction to allot the land in question in this action. "There can be no doubt," says Lord Wensleydale, in *Rorke* v. *Errington* (2), "that a court of limited jurisdiction cannot give itself jurisdiction by finding any facts." It must be shewn, therefore, that the conditions precedent to jurisdiction were fulfilled. In order to found jurisdiction under s. 13 of the Act of 1848, on a proceeding for partition, there must be an application of the persons "interested, according to the definitions in the first recited Act, in the several undivided shares of land . . . . and who shall desire to effect a partition of such land." It is obvious that from the very nature of partition the undivided interests must extend over the whole land which is to be parted out among the owners of undivided interests. The area of interest must be coextensive with the area to be divided. Could the legislature have intended that the owners of undivided shares in one acre in Yorkshire, should, by including one hundred in their application to the commissioners, give them jurisdiction to deal with the other ninety-nine in which they had no interest

(1) 24 L. J. (Ch.) at p. 549.

(2) 7 H. L. C. 617, at p. 632.

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whatever? Mr. Asquith contends that the effect of the definition of interest is to give such jurisdiction, and he relies on the first clause in the definition of persons interested, viz., "persons in the actual possession or enjoyment of any such land *or any part thereof*." It seems to me that other definitions which were introduced with reference primarily to proceedings upon inclosures, must, when read into a section dealing with a different subject-matter, viz., partition outside inclosure altogether, be taken with such modifications as are necessary to make them compatible with the express provisions of the section with which they are incorporated. Here the 13th section itself defines the area of the undivided interest. It must be an undivided interest in *such* lands as they, the applicants, are desirous of partitioning, and it seems to me that the section cannot be satisfied if the applicant shews interest in a part only of the area, and asks for partition of the whole. He is entitled to ask for partition of so much only as he is interested in, and he does not prove interest in the whole by proving interest in a part. That part of the definition which defines interest as possession is incorporated, that part which says possession "of any part thereof" is inconsistent with the substantive enactment of the section and must be rejected. There was, therefore, never any jurisdiction in the commissioners to deal with the land in question in this action, inasmuch as they never had before them any application by the persons interested therein according to the true meaning of that expression. It follows that on both the grounds I have dealt with my judgment must be for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Cookson, Wainewright, & Pennington.*
Solicitors for defendants: *Paterson & Sons.*

H. D. W.

1891 Nov. 28.

CASTLEGATE STEAMSHIP COMPANY, LIMITED *v.* DEMPSEY AND OTHERS.

Ship—Charterparty—Demurrage—"Cargo to be Discharged with all Despatch as Customary"—Effect of Strike at Port of Discharge—Effect of Default of Dock Company.

By the terms of a charterparty, in which the port of discharge was specified, the cargo was "to be discharged with all despatch as customary":—

Held, by Wright, J., that the effect of the charterparty was to render the charterers liable for delay occasioned by a strike of labourers at the port of discharge during the unloading of the cargo, but not for delay arising from the default of the dock company, which, according to the custom of the port, did the work of discharging for both shipowners and charterers, and whose dilatory conduct in the performance of such work was well known and taken into account by persons chartering their ships to the port in question.

Hick v. *Rodocanachi* ([1891] 2 Q. B. 626) considered.

CASE tried before Wright, J., at Liverpool. The facts and arguments sufficiently appear in the judgment.

Barnes, Q.C., and *Pickford*, for the plaintiffs.

Kennedy, Q.C., and *Joseph Walton*, for the defendants.

Cur. adv. vult.

1891. Nov. 28. WRIGHT, J. In this case the dispute is whether the shipowner or the charterer is to bear the loss in the nature of demurrage occasioned by a strike of labourers during the unloading of a cargo of deals at Garston.

The charterparty was in the following form, so far as material. The ship was to "proceed to Garston and deliver the cargo as customary on being paid freight, &c. . . . . subject to the regulation of the ports, and weather and ice permitting, and to the navigation being officially declared open, the cargo to be supplied alongside as fast as the steamer can take it in, Sundays and legal holidays excepted, and *to be discharged with all despatch as customary*, and ten days on demurrage over and above the said lying days, at 6*d.* per nett register ton per day, ... vessel to discharge in a dock and berth as ordered by charterers or their agents, . . . the usual custom of the wood trade of each port is to be observed by each party in cases where not specially

expressed, ... the act of God, perils of the sea, fire, barratry of the master and crew, enemies pirates and thieves, arrests and restraints of princes rulers and people, collisions stranding and other accidents of navigation excepted, even when occasioned by negligence default or error in judgment of the pilot master mariners or other servants of the shipowners."

In relation to the time for unloading three forms of charter-party are in common use. One form specifies a limited period of days or other time within which the unloading is to be completed; and under that form it is settled law that the charterer must pay for detention by a strike or otherwise beyond that period, unless a different intention has been expressed or the detention is the fault of the shipowner himself or of persons for whose conduct he is to be held responsible: *Budgett* v. *Binnington* (1); *Porteus* v. *Watney* (2); *Thiis* v. *Byers* (3); *Postlethwaite* v. *Freeland.* (4) Another form is silent as to the time in which the unloading is to be completed; and under that form it seems equally well settled that the charterer is bound only to reasonable despatch; and this has been held by the Court of Appeal in *Hick* v. *Rodocanachi* (5), following *Ford* v. *Cotesworth* (6), to mean not that the charterer must unload within a time which would be reasonable under ordinary circumstances, but only that he must use proper diligence under the actual circumstances; and he is therefore not liable for delay by a strike unless the strike is attributable to his own default: compare *Postlethwaite* v. *Freeland.* (7) The third form fixes a limit of time not directly but by some mode of reference to the custom of the port of discharge; and under this form it has been decided in *Postlethwaite* v. *Freeland* (8) that the period so indicated is not necessarily the customary time under ordinary circumstances, and that impediments arising in the particular case from or out of the custom or practice of the port, which the charterer could not have overcome by reasonable diligence, may or ought to be taken into consideration in his favour.

(1) [1891] 1 Q. B. 35.
(2) 3 Q. B. D. at p. 543.
(3) 1 Q. B. D. 244.
(4) 5 App. Cas. 599.
(5) [1891] 2 Q. B. 626.
(6) Law Rep. 5 Q. B. 544.
(7) 5 App. Cas. at p. 608.
(8) 4 Ex. D. 155; 5 App. Cas. 599.

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Wright, J.

In the present case the charterparty appears clearly to be of the third kind. The expression is "to be discharged with all despatch as customary," and in this expression the words "as customary" appear properly referable to the word "despatch" as descriptive of time, and not to the mere manner of unloading: see per Thesiger, L.J., in *Postlethwaite* v. *Freeland.* (1) The question is whether under such a charterparty the rule applied to the second form in *Hick* v. *Rodocanachi* (2) is applicable, so that the charterer would be bound only to use proper diligence under the actual circumstances, and so would not be liable for the consequences of the strike, or whether he is not bound to discharge within the customary time except so far as delay may have resulted from impediments arising out of the custom or practice of the port itself. I am of opinion that the rule adopted by the Court of Appeal in *Hick* v. *Rodocanachi* (2) is not applicable in the present case. That rule, if so applied, would in effect give to a charterparty which specifies that the unloading is to be done with all despatch as customary the same meaning as if it had contained no such words. An undertaking to unload with all despatch as customary necessarily involves something more than the ordinary obligation which would exist if that undertaking had been omitted. *Postlethwaite* v. *Freeland* (3) decides that under a charterparty of this kind the charterer may be excused by impediments arising from or out of the custom and practice of the port itself, including probably impediments arising from the extent and nature of the accommodation and appliances of the port; but it does not decide that he is excused by extraneous impediments such as a strike, which in no way arises from or out of that custom and practice. It is no doubt the fact that in *Postlethwaite* v. *Freeland* (4) Lord Blackburn appears to some extent to have treated decisions on charterparties of the second kind as authorities in relation to charterparties of the third kind; but I cannot discover any indication of an intention to lay down any different rule from that which is to be gathered from the other opinions delivered in that case.

In this view of the proper construction of the charterparty it

(1) 4 Ex. D. at p. 158.
(2) [1891] 2 Q. B. 626.
(3) 5 App. Cas. 599.
(4) 5 App. Cas. 599, at p. 613.

remains to ascertain the time which would have been occupied in the unloading if the strike had not occurred. The actual time extended to twenty days, of which I find that a portion equal to two days is to be attributed to actual cessation of work or short hours, and a portion equal to two more days to inexperience or want of organization in the strangers employed; and for these four days the charterers are, in my opinion, liable.

A further question arises in this way. It is said, and I find it to be the fact, that the dock company, who customarily and actually did the work of discharge both for the shipowner and for the charterer, were unduly dilatory as a matter of habit, both at the time in question and at other times, and that with the ordinary appliances of the port the cargo should, in the absence of a strike or lock-out, have been discharged in a period which I find to be ten days; and if the charterers are responsible for this the plaintiffs are entitled to twelve days' demurrage or damages in all, including the four days due to the strike. There is, however, evidence that the slackness of the dock company in doing the work was notorious, and was taken into account by persons chartering their ships for Garston. It was nevertheless customary to allow the dock company to do the work, and any delay so caused was attributable in part to them in their character as representatives of the shipowner in getting the cargo out of the ship. Under these circumstances, and having regard to the fact that the port is fixed by the charterparty, I think that the shipowner is not entitled to insist on a different and more energetic system of management, and that apart from the strike there is no sufficient evidence of less despatch than all despatch as customary. There will be judgment for the plaintiffs for damages for four days' delay, or 114*l.* 2*s.* with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Maples, Teesdale & Co.*, for *Leitch, Dodd, Bramwell, & Bell, North Shields.*

Solicitors for defendants: *Wynne, Holme, & Wynne*, for *H. Forshaw & Hawkins, Liverpool.*

H. D. W.

C. A.
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Nov. 17.

[IN THE COURT OF APPEAL.]

HEDLEY *v.* THE PINKNEY AND SONS STEAMSHIP COMPANY, LIMITED.

Ship—Owner of Ship and Seaman, Contract between—Obligation of Owner under Merchant Shipping Act, 1876 (39 & 40 *Vict. c.* 80), *s.* 5—"*Seaworthiness*"—*Negligence—Master and Servant—Negligence of Captain—Fellow Servant—Common Employment.*

The captain and crew employed in the navigation of a ship by the owner are fellow-servants engaged in a common employment; and therefore the shipowner is not liable to an action for negligence of the captain by which one of the crew is injured or loses his life.

The Merchant Shipping Act, 1876, s. 4, makes it a misdemeanour (subject to certain exceptions) to send a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, and s. 5 provides that, in every contract of service between the owner of a ship and the master, or any seaman thereof, there shall be implied an obligation on the owner of the ship that the owner of the ship and the master shall use all reasonable means to insure the seaworthiness of the ship for the voyage, at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same.

A ship, which is properly equipped for encountering the ordinary perils of the sea, does not become unseaworthy within the above enactment, because the captain negligently omits to make use of part of her equipment.

A ship was constructed with an opening in her bulwarks for the purposes of a gangway, protected by a moveable railing, which could be speedily shipped or unshipped as occasion required. During a storm, the railing being unshipped at the time, one of the crew fell overboard through the opening in the bulwarks and was drowned:—

Held, that, the ship being provided with sufficient means of closing the opening readily available, the fact that such opening was unprotected at the time of the accident did not make the ship unseaworthy within s. 5 of the above-mentioned Act; and therefore the shipowners were not liable to an action for breach of the obligation created by that section.

Query, whether a ship would be unseaworthy within the meaning of the above-mentioned sections by reason of a defect in her equipment which affected the safety of individuals on board from perils of the sea, but which did not affect the safety of the ship herself.

ACTION brought by the widow and administratrix of a deceased seaman for damages in respect of the death of her husband, against the shipowners, in whose employment he was at the time of his death.

At the trial before Grantham, J., with a jury, the facts appeared

to be as follows. The deceased was engaged as one of the crew of a steamship belonging to the defendants on a voyage from London to Cardiff. There were gangways or openings in the bulwarks of the ship opposite the hatches, where the bulwarks were much lower for convenience in loading and unloading the ship. These gangways were, when not in use, protected by moveable railings, which had stanchions fitting into holes in the bulwarks and could be shipped or unshipped as occasion required. The vessel, having unloaded a cargo in the port of London, was in the Channel on her way to Cardiff, in ballast, when she was overtaken by a storm. The moveable railings at the gangways, which had been unshipped while the vessel was in port, had not been replaced in position. Through a violent lurch of the vessel, the deceased man lost his footing and went overboard through one of these openings in the bulwarks, and was drowned.

During the voyage before the accident happened, one of the crew had asked the mate whether he should ship the railings, but the mate told him not to mind about them but to clear the holds of dunnage. It appeared that the captain had passed the gangways during the voyage, and must, or ought to have observed that the railings were not shipped. It would have taken about twenty minutes to ship all the railings. If the railing had been in its place the deceased could not have gone overboard through the gangway. The evidence shewed that the railings were intended for the protection of the crew and had nothing to do with the safety of the ship herself.

The learned judge directed the jury that the term "seaworthy," as used in the Merchant Shipping Act, 1876, s. 5, meant in such a condition as to be properly fit to encounter the ordinary perils of the sea in reference to the safety of the crew. The jury found a verdict for the plaintiff for 175*l.* damages.

The defendants gave notice of motion for a new trial on the ground of misdirection or to enter judgment for themselves. (1)

(1) The Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), s. 4, provides that "every person, who sends, or attempts to send, or is party to sending, or attempting to send a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, shall be guilty of a misdemeanour, unless he proves that he used all reasonable

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Finlay, Q.C., Cyril Dodd, Q.C., and *A. Lennard*, for the defendants. The case for the plaintiff was put in two ways. First, it was put as a case of negligence by the captain in not seeing that the railings were shipped when rough weather was coming on, for which the defendants, his employers, are liable. The cases of *Wilson* v. *Merry* (1) and *Howells* v. *Landore Steel Company* (2) clearly shew, however, that the captain of a ship is a fellow-servant of the crew within the doctrine of common employment, and therefore the shipowners are not liable to an action for the death of the deceased seaman, through negligence of the captain. They also cited on this point *Johnson* v. *Lindsay & Co.* (3) Secondly, the case was put as being one of breach of the obligation created by the 5th section of the Merchant Shipping Act, 1876. But this section is plainly limited to cases where the ship is sent to sea insufficiently found and equipped, or is not kept sufficiently found and equipped during the voyage. A ship is seaworthy if she is in a fit state as to repairs and equipment, and in all other respects to encounter the ordinary perils of the voyage: *Dixon* v. *Sadler*. (4) This vessel was seaworthy according to that definition. A ship cannot be deemed unseaworthy when she is in good repair and properly found and equipped, because there is negligence in the use of her equipment: *Steel* v. *State Line Steam Ship Co.* (5) In this case there was on board the proper appliance for closing the opening in the bulwarks ready to hand. The fact that it was not put into

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means to insure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, &c., &c."

Sect. 5 provides that "In any contract of service, express or implied, between the owner of a ship and the master or any seaman thereof . . . there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master . . . shall use all reasonable means to insure the seaworthiness of the ship for the voyage, at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same; provided that nothing in this section shall subject the owner of any ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable."

(1) Law Rep. 1 H. L., Sc. 326.
(2) Law Rep. 10 Q. B. 62.
(3) [1891] A. C. 371.
(4) 5 M. & W. 405.
(5) 3 App. Cas. 72.

position may shew negligence on the part of the captain, but cannot amount to unseaworthiness of the ship.

E. Tindal Atkinson, Q.C., and *F. W. Raikes*, for the plaintiff. It was clearly negligence on the part of the captain to allow the railing to remain unshipped. There is no case in the English Courts which shews that the captain of a ship is a fellow-servant of the crew in the sense in which the term is used for the purposes of the doctrine of common employment. Directly the ship sails, the captain is the representative of the owner. In the case of *Ramsay* v. *Quinn* (1) in the Irish Court of Common Pleas, it was held that the captain of a ship was not for this purpose a fellow-servant of the sailors, but the agent or representative of the owners of the vessel during the voyage, and that the owners were responsible for the injury to or death of a sailor resulting from the negligence of the captain. [They also cited on this point *Murphy* v. *Smith*. (2)] Secondly, there was a breach of the obligation created by the 5th section of the Merchant Shipping Act, 1876, that the master shall use all reasonable means to keep the ship in a seaworthy state during the voyage. Having regard to the object of the legislation, as shewn by the 4th section of the Act, which uses the words "such unseaworthy state that the life of any person is likely to be thereby endangered," the term "seaworthy," as used in the 5th section, must be construed to mean that the ship must be safe for the purpose of carrying the seamen on board of her, as regards the perils of the sea. This vessel was not kept seaworthy during the voyage in that sense, because the captain, by allowing the railings to remain unshipped, allowed her to be unsafe for the carriage of the crew. The enactment was passed for the protection of the lives of seamen, and, if it be held to be sufficient that the necessary equipment has been provided at the commencement of the voyage to make the ship seaworthy, so far as the safety of the crew is concerned, but that the section does not bind the captain to use such equipment during the voyage, the object of the enactment will be to a great extent defeated. Assuming that this ship was seaworthy at the commencement of the voyage, reasonable means were not taken to keep her seaworthy during the voyage, so far as the safety of

(1) Ir. Rep. 8 C. L. 322. (2) 19 C. B. (N.S.) 361.

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the crew was concerned, because when a storm was coming on these railings were not shipped.

Finlay, Q.C., was not called on to reply.

LORD ESHER, M.R. I am of opinion that there was no evidence in this case to support the plaintiff's claim. The case for the plaintiff was put alternatively in two ways. First, it was said that, apart from the Merchant Shipping Act, the captain of the ship was guilty of negligence, which occasioned the death of the plaintiff's husband, and that the owners of the ship were responsible to the plaintiff for his negligence under Lord Campbell's Act. I think there was evidence for the jury of negligence on the part of the captain. I think that it was his duty under the circumstances to see that the moveable rails which went on the top of the bulwarks at the place in question were in their proper position, at all events when a storm was coming on. I also think that there was evidence which justified the jury in finding that this negligence was the cause of the man's death. The question is whether, apart from the Merchant Shipping Act, the owners of the ship are liable for the negligence of the captain with regard to the safety of one of the crew. The basis of the liability in such a case is that the master is liable for the negligence of his servant; therefore, the first step the plaintiff must take to establish the owners' liability is to shew that the captain is their servant. It is clear that the captain is the servant of the shipowners. He is appointed and paid by them; they can dismiss him, and he is subject to their orders. The seaman is a servant of the owners also. The captain, no doubt, is a superior servant, and the seaman is an inferior servant, bound to obey the orders of the captain; but they are both servants of the same master, employed in the same operation. They are, therefore, fellow-servants engaged in a common employment. The common law of England is that, where fellow-servants are engaged in a common employment, whether one is inferior to the other, whether one is bound to obey the other or not, the master is not liable for injury occasioned to the one through the negligence of the other. There has been some discussion how far the law of Scotland is the same, but it was long ago settled that the law of England is

as I have stated. The Irish case of *Ramsay* v. *Quinn* (1) has been cited to shew that it has been held in Ireland, not that a master is responsible for injuries occasioned to a servant through the negligence of a superior fellow-servant, but that a shipowner is liable for injuries occasioned to a seaman on board a ship through the negligence of the captain of the ship. The way in which the case is there put is that the position of the captain of a ship is for this purpose, not that of a servant, but that of a superintendent, and for the purpose of shewing that reliance is placed on a passage in Story on Agency. The service of a captain of a ship is no doubt a peculiar kind of service, but the passage referred to in Story does not seem to me to shew that he is not a servant. I must decline to accept the decision in the case of *Ramsay* v. *Quinn* (1) as authority with regard to the English law on the subject, and, if the Court in that case meant to hold that what they were deciding was the English law on the subject, I must say that I cannot agree with them. To my mind, it is clear that the plaintiff cannot rely on the negligence of the captain, because he was the fellow-servant of the deceased man.

Secondly, it was said that, even if that be so, the action can be maintained by reason of the 5th section of the Merchant Shipping Act, 1876. It is obvious that this is a wholly different cause of action from that at first suggested. It would not depend on negligence, except so far as there might be negligence amounting to a breach of the obligation to use reasonable means to insure the seaworthiness of the ship, within the meaning of the Act, and to keep her seaworthy during the voyage. It was argued that there was evidence on which the jury might find that the ship was unseaworthy, within the meaning of the Act, when the accident happened, and that the captain did not use all reasonable means to keep her seaworthy at that time. The question is whether there was such evidence. It was argued in effect that, for the purposes of this section, "unseaworthy" is equivalent to "unsafe;" that the owner is bound to send the vessel to sea in such a condition that she is safe with regard to the safety of the crew, and of every one of them, and that the

(1) Ir. Rep. 8 C. L. 322.

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captain must use reasonable care that she shall continue safe with regard to their safety at every point of the voyage. The term "seaworthy" is a well-known term in nautical matters. In this Act it is used with regard to such matters. It appears to me that, in the absence of any reason to the contrary, it must receive in this Act its ordinary meaning in nautical matters. What is that meaning? It has been well explained by Parke, B., in *Dixon* v. *Sadler*. (1) He there says: "In the case of an insurance for a certain voyage it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it." The question being one of insurance he is dealing with the time of sailing, but the legal definition given of seaworthiness, which is not applicable only to insurance cases, is that the ship must be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage. The meaning of that definition is well illustrated by instances given by Lord Blackburn in the case of *Steel* v. *State Line Steamship Co.* (2) In that case a port hole of a ship had been left insufficiently fastened. He there says, "If, for example, this port was left unfastened so that, when any ordinary weather came on and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done—if in the inside the wheat had been piled up so high against it and covered it so that no one could ever see whether it had been so left or not, and so that, if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo, and get at, and fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship, which sailed in that state, did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. I think, on the other hand, if this port had been, as a port in a cabin or some other place would often be, open, and

(1) 5 M. & W. 405. (2) 3 App. Cas. 72.

when they were sailing out under the lee of the shore remaining open, but quite capable of being shut at a moment's notice, so soon as the sea became in the least degree rough, and, in case a regular storm came on, capable of being closed with a dead light—in such a case as that no one could, with any prospect of success, ask any reasonable people, whether they were a jury or judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right, and it would have been put right; if they did not put it right after such a warning, that would be negligence on the part of the crew, and not unseaworthiness of the ship." It seems to me that these words of Lord Blackburn give an exact criterion whether the ship was "seaworthy" in the present case. The complaint must be that the ship was not properly equipped at the time of the accident. But the moveable railing which went on the top of the bulwark was there, and was capable of being shipped; it was not denied that, if it had been put in its place, it was a sufficient security for the crew against ordinary risks of going overboard. It is exactly like the case described by Lord Blackburn of the port-hole left open, but which could be easily shut at any moment. The ship was in such a state and so equipped that, if the captain had done what it was his duty to do, when he saw a storm coming on, she could have been made safe in a moment. Under these circumstances, according to the illustration given by Lord Blackburn, the case is one of negligence on the part of the captain, not of unseaworthiness on the part of the ship. Therefore, in the ordinary sense of the term, this vessel was "seaworthy." It was argued that the term "seaworthy" has a peculiar meaning in this Act of Parliament; that the term as there used has relation to different matters from those to which it has relation in the case of bills of lading and charterparties; that in the case of those documents the term is used with regard to the safety of the cargo, whereas in the Act it is used with regard to the safety of the crew. It was said that the Act means that the ship must be seaworthy with regard to the safety of the crew or others on board. But that does not

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alter the fact that "seaworthiness" must relate to the condition of the vessel, and therefore, if the ship is "in a fit and proper state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage" with regard to the safety of the crew, she is seaworthy within the meaning of the section. Here the ship was so equipped and in such a state of repair and had such a crew as made her safe with regard to the safety of the crew from all the ordinary perils of the voyage, if the captain had taken proper care in the use of the ship's equipment. Therefore it comes to this, that the accident happened, not through any defect in the repair or equipment of the ship, but through the captain's negligence in not using with proper care the means of safety which were at hand and available. That being so, it is unnecessary to consider any of the questions which have been suggested, such as whether, if the railing had been carried away or fallen overboard, and the captain had not taken other means to protect the gangway, or if, having an opportunity of putting into some port and procuring new railings, he had not done so, there would have been a failure to take reasonable means to keep the ship seaworthy within the Act. These are questions which may arise hereafter, but they do not arise in the present case. It appears to me that there was no evidence upon which the jury were entitled to find that there had been a breach of the obligations created by the 5th section of the Merchant Shipping Act, 1876, and that therefore the learned judge ought not to have allowed the case to go to the jury. For these reasons I think that we ought to order judgment to be entered for the defendants.

LOPES, L.J. I am of opinion that this action cannot be maintained. The action is put in the first place as an action for negligence of a servant of the owners, for which they are responsible. There is no doubt that the accident was occasioned by the negligence of the defendants' servant, the captain; but the question is whether the owners are responsible for his negligence. It seems to me clear that they are not upon the principle of law, which has been well known since the decision in *Priestley*

v. *Fowler* (1), and was acted on in *Wilson* v. *Merry* (2), viz., that the master is not liable for injuries occasioned to a servant by the negligence of his fellow-servant, principally because such negligence is one of the risks which the servant must be taken to have contemplated and undertaken when he entered into the employment. We have to consider what the position of the captain of the ship is in relation to this doctrine; whether he is for this purpose to be regarded as the servant of the shipowner, and, therefore, the fellow-servant of the deceased man. The shipowner appoints and pays him, and can dismiss him. These are the ordinary incidents of the status of a servant, and apart from authority would shew that the captain is a servant of the shipowner. But it was said that the case of a captain of a ship is an exception from the ordinary rule. An Irish case was cited to shew that he is in the position rather of an agent or alter ego of the shipowner than of a servant. In England there is no authority for that proposition. On the contrary, the case of *Wilson* v. *Merry* (2) appears to be an authority against it, for in that case the servant was the manager of a mine; and I find that in *Howells* v. *Landore Steel Co.* (3) Lord Blackburn said during the argument, "Under the Merchant Shipping Act the captain of a ship must be certificated, but it never was suggested that that made any difference in the position of the captain as servant to the shipowner;" and, again, in the judgment, he said, "There have been several cases in which, whether vice-principal or manager, the person has been held to be a fellow-servant. In Scotland it seems that a vice-principal has been held to be in a different position from an ordinary fellow-servant. But the decision of the House of Lords is distinct, at least so far as this, that the fact that the servant held the position of vice-principal does not affect the liability of the master for his negligence as regards a fellow-servant." Again, in the recent case of *Johnson* v. *Lindsay & Co.* (4), Lord Herschell said, in commenting on the case of *Wilson* v. *Merry* (2) and on what Lord Cairns said in that case, "It is clear to my mind that, when Lord Cairns used this language, he was only intending to repudiate the contention put

(1) 3 M. & W. 1.
(2) Law Rep. 1 H. L., Sc. 326.
(3) Law Rep. 10 Q. B. 62.
(4) [1891] A. C. 371.

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forward by the appellant in that case that the rule applied exclusively to workmen of the same grade actually employed in a common labour, and had no application where the person whose negligence was complained of was in the position of a manager not taking part in manual labour, who was in fact the employer's alter ego." On the strength of these authorities I come to the conclusion that the decision in the Irish Court is not good law, at any rate according to the law of England. Therefore I think that the captain of the ship and the deceased man were fellow-servants, and the principle of law which I have stated applies; and consequently the defendants are not liable for the captain's negligence.

But then it is contended that the case comes within the 5th section of the Merchant Shipping Act, 1876, which provides that "in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that the owner of the ship and the master shall use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same." The case for the plaintiff is put in this way: it is said that the ship was not seaworthy; that, assuming that she was so when the voyage commenced, she was not so at the time when the accident happened. That raises the question what the meaning of the term "seaworthiness" is as used in the section. It was argued that "seaworthiness" was equivalent to "safety." I cannot adopt that view. The term "seaworthy" is well known to the law, and has received definitions from those who were most competent to give them—for instance, from Parke, B., who says, in *Dixon* v. *Sadler* (1), that it means that the ship must be "in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage." For the purposes of this Act I should have adopted that definition, and have told the jury that under the 5th section "seaworthy" meant that the vessel must be "fit as to repairs, equipment, and crew, and in all other respects, to

(1) 5 M. & W. 405.

encounter the ordinary perils of the voyage," and that the captain was bound to use all reasonable means to keep the vessel in that condition during the voyage. If that be so, what was the state of this vessel? Admittedly she was in a fit state at the commencement of the voyage. Then what happened afterwards? She was furnished with a railing which, if it had been used, would clearly have been sufficient to protect the seamen, but that railing was not used at the particular moment. The fact that it was not so used constituted negligence on the part of the captain, but not unseaworthiness of the ship. It was on board at hand and fit for use when the voyage commenced and when the accident happened, and might have been put in its place in a few moments. The accident really happened through the negligence of the captain, not through any unseaworthiness of the ship. For these reasons I agree that judgment should be entered for the defendants.

KAY, L.J. I agree in the conclusion arrived at by the other members of the Court. With regard to the first point, I cannot see how the decision in the Irish Court which has been cited to us can be reconciled with what was laid down in *Wilson* v. *Merry* (1) and *Johnson* v. *Lindsay & Co.* (2) No doubt the captain was negligent in not having the railing, which formed the upper part of the bulwark opposite the hatchway, put into its place when a storm was coming on. The first question is whether, apart from the Merchant Shipping Act, the owners are liable for that negligence of the captain. Certainly not, if the doctrine of "collaborateur," as it has been called, applies, and if the captain and the seaman who lost his life were fellow-servants engaged in a common employment. In the case of *Wilson* v. *Merry* (1), a man employed in a mine lost his life through an explosion caused by the negligence of a manager of the mine, who was in a superior position, in carrying out the work of the mine, and the argument was that, because he was in a superior position, he could not be considered a fellow-workman with the deceased man. The House of Lords rejected this contention, and held that, though the manager was in a position superior

(1) Law Rep. 1 H. L., Sc. 326. (2) [1891] A. C. 371.

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to that of the deceased, and had to some extent the control and management of the mine, they must be considered to be fellow-servants. Primâ facie I see no difference between that case and the case of a captain of a ship and one of the crew. The owner of a mine does not generally attend personally in the mine and look after the working; he employs a manager for the purpose. So also a shipowner does not generally attend on board the ship and see to the working of it. He leaves that to the captain. Why is not the captain of a ship as much a fellow-servant of and engaged in a common employment with one of the crew as the manager of a mine is a fellow-servant of and engaged in a common employment with a miner? Lopes, L.J., has read a passage from the judgment of Lord Herschell in *Johnson* v. *Lindsay & Co.* (1), which appeared to me to be in point, and I will not repeat it. But there is a passage in Lord Watson's judgment in the same case, also commenting on the observations of Lord Cairns in *Wilson* v. *Merry* (2), to which I will refer. He said, "In moving the affirmance of the judgment, the Lord Chancellor (Cairns), after citing the opinion of Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (3), went on to say, 'I would only add to this statement of the law that I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not or is in any technical sense the fellow-workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred, the negligence has no doubt been the negligence of a fellow-workman; but the case of the fellow-workman appears to me to be an example of the rule, and not the rule itself.'" It was sought, in the case of *Johnson* v. *Lindsay & Co.* (1), to press that language of Lord Cairns to the extent of making it mean, that if the two persons were engaged in the same employment, it did not matter that they were the servants of different masters. The House of Lords rejected that application of his words, and Lord Watson explains them thus: "That language appears to have been regarded by the Court of Sessions as justifying the inference that the rule ought not to

(1) [1891] A. C. 371. (2) Law Rep. 1 H. L., Sc. 326.
(3) 3 Macq. 266.

be confined to fellow-servants of the same master, a construction which ignores the fact that the noble Lord was professedly speaking of the 'liability or non-liability of the master to his workmen,' and was dealing with no other subject. I do not doubt that the language of the noble and learned Lord was simply intended to express his opinion, that to hold that a fellow-servant who was in a sense the alter ego of the master, and who directed but did not labour in the common employment, was not a collaborateur, was a strained and technical interpretation of the rule." In other words, here we have the opinion of the House of Lords that the language of Lord Cairns was to be read as meaning—and they agreed to the doctrine—that a fellow-servant who is the alter ego of the master, who directs but does not labour, is a collaborateur for the purposes of the rule of law on the subject. If that rule be read as the decisions in *Wilson* v. *Merry* (1) and *Johnson* v. *Lindsay & Co.* (2) shew that it ought to be read, how can it be said that it does not include the case of the captain of a ship and one of the crew? The master of a ship is in a sense the alter ego of the owner during the voyage. But he is the servant of the owner, and every member of the crew is a servant of the owner. Though the captain be in a sense the alter ego of the owner, that does not make him the less a fellow-servant of the crew for the purposes of the rule, which says that the master shall not be liable for injuries occasioned to a servant by the negligence of his fellow-servant. I cannot myself see much difference for this purpose between the manager of a mine and the captain of a ship. For these reasons I think that the captain of the ship and the deceased man were fellow-servants engaged in a common employment, and therefore the defendants are not liable in respect of the captain's negligence.

The second point turns on the Act of Parliament, which, so far as material, enacts that there shall be implied in the contract for the employment of a seaman an obligation on the part of the owner that the owner and the master shall use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a

(1) Law Rep. 1 H. L., Sc. 326. (2) [1891] A. C. 371.

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seaworthy condition for the voyage during the same. It is argued that there was in this case a breach of this obligation, because the captain did not use all reasonable means to keep the ship in a seaworthy condition during the voyage. The facts as to that are simply these. There was a moveable railing, forming part of the bulwarks, which had been unshipped, but which could be replaced in its position within a few minutes. It was ready to hand on deck just within the bulwarks. There was nothing to do in order to place it in position but to put the stanchions attached to the rail into the holes in the bulwarks. If that had been done, admittedly the vessel would have been seaworthy; but it is said that, because the captain did not cause that to be done, he did not use reasonable means to keep her seaworthy within the Act. To illustrate this contention I will take the case of a hinged door in the bulwarks which is left open, and through which, in consequence of a lurch of the ship, a seaman goes overboard. Would the negligence of the captain in allowing the door to remain open, when the ship is at sea, be neglect which would make the vessel unseaworthy within the Act? Or suppose there was such a door, which fastened with a bolt, and the door was closed, but the bolt was not fastened, and, through a lurch of the ship, the door flew open and a seaman went overboard through the opening; could it be said in such a case that the letting the door remain unbolted made the ship unseaworthy, and that the captain had not used all reasonable means to keep her seaworthy during the voyage? In this provision of the Act, which is framed no doubt specially with a view to the safety of the crew, a word as familiar as any in shipping law is employed, viz., the word "seaworthy." Is it to have a different meaning in the Act from that which it has always had? Primâ facie I should say not. In the absence of anything to the contrary, I think it must be read in the ordinary sense which it has always had in shipping law. The term has been defined many times. One of the best definitions is that read by the Master of the Rolls from the judgment of Parke, B., in *Dixon* v. *Sadler*. (1) Leaving a door open or a bolt unshot, or a moveable railing out of position as in this case, clearly

(1) 5 M. & W. 405.

would not make the ship unseaworthy within that definition. The ship here had all the necessary equipment ready to be used; she was a perfect machine. It was a case of negligence in not using a perfect machine properly. I do not think it can be said that the negligence of the master in allowing a door to be left open or a bolt to be left unshot, or not having a railing placed in position, which was ready to hand, not stowed away in the hold where it could not be got at, or for any other reason unavailable, amounts to a breach of the obligation to keep the ship seaworthy under the Act. On these grounds I agree that the judgment should be for the defendants.

Judgment entered for defendants.

Solicitors for plaintiffs: *Wright & Pilley, for James Storey.*

Solicitors for defendants: *Downing & Holman, for Pinkney & Bolam.*

E. L.

IN RE PINFOLD. EX PARTE PINFOLD.

Nov. 18, 19.

Bankruptcy—Adjudication—Non-acceptance of Composition—Discretion of Court to refuse Order of Adjudication—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 20.

Where a receiving order has been made against a debtor, and a composition is not accepted in pursuance of s. 18 of the Bankruptcy Act, 1883, the Court has no discretion under s. 20 to refuse to adjudge the debtor bankrupt for the mere purpose of enabling the creditors to reconsider the proposal for the composition.

APPEAL from an order of the county court of Warwickshire adjudging a debtor bankrupt.

In July, 1889, a receiving order was made against the debtor. His only asset consisted of certain land which was mortgaged beyond its agricultural value, but which was alleged to contain blue lias of great commercial value and to be capable of providing a considerable surplus over and above the debts if it were worked for the purpose of making cement; and several attempts had been made to float a syndicate or company for that purpose. Under these circumstances at a meeting of creditors held in November, 1890, a proposal for a composition was brought

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forward, and a resolution to entertain it was passed. One of the terms of the composition was that a sum of 500*l.* should be paid to the official receiver by December 19, 1890. The money was never paid. On March 23, 1891, the examination of the debtor was concluded. The official receiver did not summon the statutory second meeting to confirm the composition, thinking that it would be nugatory to do so, the 500*l.* not having been paid. On April 20 he applied to the county court judge for an order of adjudication, but the judge adjourned the application in order that the second meeting of creditors might be called, and enlarged the time for that purpose. On May 25 the second meeting was held, and the composition was not confirmed. On June 19 the official receiver renewed his application for an adjudication, which application was opposed by a substantial portion of the creditors. The judge, however, made the order asked, being of opinion that under the circumstances s. 20 (1) made it obligatory upon him to do so, but at the same time he stated that if he had had a discretion in the matter he would have granted a further delay in order to give the creditors some chance of a dividend. From that order the debtor appealed.

J. D. Crawford, for the debtor. All that was asked for was delay, and the only question is whether s. 20 left the judge the discretion to grant it. The words "shall adjudge" are not so imperative as to deprive the Court of all discretion. This was conceded by Lord Esher, M.R., in *Ex parte Official Receiver, In re Reed, Bowen, & Co.* (2), where he said: "If there is no sufficient reason for an adjournment, and if the facts mentioned in s. 20 are made out, the registrar would have no discretion." And here the judge found that there was, in his opinion, a sufficient reason for an adjournment. In rule 192 of the Bank-

(1) By s. 20, sub-s. (1) of the Bankruptcy Act, 1883, "Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt."

(2) 19 Q. B. D. at p. 177.

ruptcy Rules, 1886, which deals with this subject of adjudication on the non-acceptance of a composition, and which may be regarded as to some extent explanatory of the section, the word used with reference to the duty of the Court is "may," not "shall." In s. 8 of the Bankruptcy Act of 1869, as here, the words were, "shall adjudge the debtor to be bankrupt." But it was held under that section in *In re Davies, Ex parte King* (1), that there was a discretion to refuse the order of adjudication. And the cases of *Ex parte Brigstocke, In re Brigstocke* (2); *Ex parte Griffin, In re Adams* (3); and *Ex parte McCulloch, In re McCulloch* (4), are to the same effect.

Sir E. Clarke, S.G., and *Muir Mackenzie*, for the official receiver, were not called upon.

VAUGHAN WILLIAMS, J. In my opinion we ought to support the order of the County Court judge. It has been contended that he acted upon the view that the word "shall" in s. 20 was a word which took away from him in all cases all discretion and left him no choice but to order an adjudication when once it had been proved to him that there had been a failure to accept the composition in pursuance of the Act. If that were the construction which he put upon the section, I should certainly hesitate before I adopted it. But I do not think that he meant to go that length; and even if he did, it is not necessary for us here to decide whether that construction of the section was the true one. The only question which we have to decide is whether he had any discretion under the circumstances of the case before him. He was not asked to refuse the order of adjudication on any of those equitable grounds upon which the Court has often refused to make the order, grounds which may be classified and summed up as those on which, if an adjudication were once made, the Court would entertain an application to annul it. This was not one of those cases. The judge here was only asked to stay his hand with the object of giving the creditors a fresh opportunity of considering what was the best course for them to take. The scheme of the Bankruptcy Act seems to be this: where the

(1) 3 Ch. D. 461.
(2) 4 Ch. D. 348.
(3) 12 Ch. D. 480.
(4) 14 Ch. D. 716.

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Court has come to the conclusion that the case is a proper one for an adjudication, it is to make a receiving order in the first instance instead of an adjudication, in order that the creditors may have an opportunity of deciding whether they wish for an adjudication or not, but the opportunities which they are given for that purpose are limited to those mentioned in s. 20; and if they do not avail themselves of them, then an adjudication is to follow as a matter of course. In my opinion the Court has no discretion to give the creditors any further opportunity of considering their position beyond those mentioned in s. 20; it has no discretion to refuse to make the order merely for purposes of delay. The making of the order cannot inflict any hardship upon the creditors, for if it should turn out subsequently that the property is capable of being developed and made available for the purposes of a dividend, they can come to the Court under s. 23 for approval of a composition notwithstanding the fact of the adjudication.

COLLINS, J. I am of the same opinion. The argument on behalf of the debtor was that the County Court judge had proceeded upon the ground that the section gave him no discretion at all. But I do not think that his judgment can properly be so understood. I gather that all he intended to decide was that he had no discretion under the circumstances of the case. It may well be that the absolute words of s. 20 are to be read as subject to the same qualifications as the equally absolute words in s. 8 of the earlier Act, with reference to which James, L.J., in *Ex parte McCulloch, In re McCulloch* (1), observed, "It is not necessary for us to say that in every case the words of s. 8, 'shall be adjudged bankrupt,' make the adjudication so clearly ex debito justitiæ that the Court has no discretion in the matter. The Chief Judge has pointed out that notwithstanding those words the Court retains its old jurisdiction to refuse to make a man bankrupt for an improper purpose, and to annul an adjudication when the justice and convenience of the case require it." But it is not suggested here that the application for an adjudication was for an improper purpose, nor that any injustice would be done by

(1) 14 Ch. D. at p. 723.

granting it; the only suggestion was that if it were refused the creditors might come to a decision which might possibly be more beneficial to themselves. But that is the very case in which the Act intended to deprive the Court of discretion.

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IN RE PINFOLD. EX PARTE PINFOLD.

Appeal dismissed.

Solicitor for the debtor: *Arnold Williams & Co.*

Solicitor for the official receiver: *Solicitor to the Board of Trade.*

J. F. C.

WESTBURY *v.* TWIGG & CO., LIMITED. GREGSON, CLAIMANT.

Nov. 2, 3.

Company—Voluntary Winding-up—Seizure of Goods of Company by Sheriff after Resolution for Winding-up—Staying Proceedings—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 133, 138, 163.

Where the goods of a company have been taken in execution after the passing of a resolution for the voluntary winding-up of the company, the Court has jurisdiction to stay further proceedings in the execution.

APPEAL from a judgment of the county court for Lancashire in an interpleader issue.

On May 8, 1891, the plaintiff commenced an action in the High Court against the defendant company to recover a sum of 54*l.* 12*s.* 11*d.*

On May 26, the defendants passed a resolution for their voluntary winding-up, and one Gregson was appointed liquidator. On the same day the plaintiff recovered judgment in the above action, and lodged a writ of fi. fa. with the sheriff. On the following day, May 27, the sheriff entered into possession of the goods of the defendants under the fi. fa. The liquidator, Gregson, having claimed the goods, the sheriff interpleaded, and the liquidator thereupon, instead of applying to the Court to stay the execution, took an issue, which issue was remitted to the county court for trial. The county court judge held that the goods were the property of the liquidator as against the plaintiff.

The plaintiff appealed.

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Clarkson, for the plaintiff. The county court judge was right, for the execution was a valid one. It is said that the execution was avoided by s. 163 of the Companies Act, 1862, which provides that when a company is being wound up by the Court, or subject to its supervision, any execution put in force against the effects of the company after the commencement of the winding-up shall be void. But that section does not apply, for here the winding-up was not by the Court, and though the liquidator might have applied to the Court immediately upon the winding-up resolution being passed to stay the threatened execution, he having failed to do so, the winding-up was not subject to the supervision of the Court.

[The Court intimated that they would treat the case as though it were an application to them to stay further proceedings in the execution.]

It is now too late; the Court has no jurisdiction to stay the execution where the application to stay is made after the sheriff has seized. This was so decided by Lord Romilly, M.R., in *In re The Hull Forge Co.* (1)

Radford, for the liquidator. In *Buckley on Companies* (6th ed., p. 396, n.), it is suggested that s. 163 applies to all cases of voluntary winding-up; and the cases of *Thomas* v. *Patent Lionite Co.* (2), and *In re Thurso New Gas Co.* (3), seem to support that contention. But that is not the only section applicable to the case. By s. 133, sub-s. 7, the liquidator in a voluntary winding-up "may, without the sanction of the Court, exercise all the powers by this Act given to the official liquidator," one of which is "to take into his custody or under his control" all the property of the company (see s. 94); and the goods seized were still the property of the company, the execution not having been completed by sale. But at any rate the Court has power now to stay the execution, notwithstanding the fact of seizure by the sheriff. By s. 138 "Where a company is being wound up voluntarily, the liquidators may apply to the Court to exercise all or any of the powers which the Court might exercise if the company were being wound up by the Court." The section is

(1) 36 L. J. (Ch.) 337. (2) 17 Ch. D. 250.
(3) 42 Ch. D. 486.

perfectly general, and contains no limitation as to the time within which the application is to be made. The decision of Lord Romilly, M.R., in the case cited, was shortly afterwards dissented from by Stuart, V.C., in *In re The Sablonière Hotel Co.* (1), and has apparently never since been followed.

Clarkson in reply.

DAY, J. In my judgment the proper course for the claimant in this case would have been not to have taken an issue in the interpleader proceedings as he did, but to have applied to the Court to restrain the judgment creditor from proceeding further with the execution. In order then to enable us to do what is right and proper in the matter, we may disregard the form in which the case now comes before us, and treat the present application as an application to us to do now what the Court should have been asked to do at the outset, namely, to order a stay of proceedings in the execution.

If the winding-up of this company had been a winding-up "by the Court or subject to the supervision of the Court," such an application to stay would indeed have been unnecessary, for by s. 163 of the Companies Act, 1862, any execution put in force after the commencement of the winding-up is ipso facto void, and here the seizure by the sheriff was not until after the resolution to wind up had been passed, and the winding-up had consequently commenced. But that section did not apply, the winding-up being voluntary and not under the supervision of the Court. But although in this case the execution was not ipso facto void, it was competent for the Court, upon an application to it for that purpose, to make an order to stay all further proceedings in it. For by s. 138, "When a company is being wound up voluntarily, the liquidators . . . may apply to the Court . . . to exercise . . . all or any of the powers which the Court might exercise if the company were being wound up by the Court." And one of the powers which the Court would undoubtedly exercise, if the company were being wound up by the Court, would be that of staying proceedings in execution. That section

(1) Law Rep. 3 Eq. 74.

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seems to me to enable the liquidator in such a winding-up as this to apply for a stay of proceedings in an execution commenced after the date of the resolution for winding-up. I am of opinion that until the execution is completed by seizure and sale, the Court has power to restrain such proceedings, and will not hesitate to exercise that power. What the Legislature aimed at was that the assets of insolvent companies should be distributed equally among their creditors, and it aimed at such equality of distribution just as much where the company was being wound up voluntarily as where it was being wound up under an order of the Court.

GRANTHAM, J. I am of the same opinion, though I must admit that the case is to my mind one of considerable doubt. The counsel for the execution creditor relied upon a decision of Lord Romilly in 1866, but that decision was doubted almost immediately afterwards by a judge of equal authority, Stuart, V.C., and, so far as appears to the contrary, there is no reported case since that date in which this question has ever arisen. The only authorities therefore on the point being evenly balanced, we must treat the matter as if it had never been the subject of decision. The question is whether the Court has the same power of staying executions in the case of a voluntary winding-up as it has in the case of a winding-up by the Court. I am of opinion that it has by virtue of s. 138. There is no reason why the creditors of a company should be treated differently according as it is wound up voluntarily or compulsorily. The Legislature evidently intended the same principle to be applied to both classes of winding-up. The only distinction between the two is that in order to prevent a creditor from obtaining the fruits of a threatened execution in the case of a voluntary winding-up an express application to the Court for that purpose is necessary. Lindley, L.J., in his work on Company Law, at p. 883, says, "A purely voluntary winding-up does not, per se, prevent a creditor of the company from suing it, or issuing execution against it . . . But he may be restrained as well from issuing execution as from suing." I think we may treat this case as if it were an application to stay the execution, and such a stay should be ordered

accordingly; but as the proceedings taken by the claimant were wrong in form, the order ought to be without costs.

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WESTBURY v. TWIGG & Co.

Execution stayed.

Solicitors for execution creditor: *Chester & Co., for Horrocks, Radcliffe.*

Solicitors for claimant: *Cunliffes & Davenport, for Darbishire, Tatham, & Worthington, Manchester.*

J. F. C.

IN RE AN ARBITRATION BETWEEN WILSON & SON, AND THE EASTERN COUNTIES NAVIGATION AND TRANSPORT COMPANY.

Nov. 21

Arbitration— Arbitrator — Appointment by Judge's Order — Jurisdiction to Appoint—Arbitrator refusing to Act or incapable of Acting—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 5 (*b*).

A contract made before the commencement of the Arbitration Act, 1889, provided that any differences arising should be referred to a named arbitrator, who should be standing referee, or, failing him, to a person to be named by a person specified in the contract. It was afterwards agreed that the arbitration should be conducted according to the Arbitration Act, 1889. The arbitrator made an award. He left the country, and during his absence (further differences having arisen) one of the parties applied to the person specified in the contract to name another arbitrator, which was done. The person so named objected to act unless appointed by a judge's order, which was applied for and obtained, but was not to take effect if the arbitrator named in the contract should return by a certain day. He did not return until after that day.

On appeal from the order appointing the second arbitrator:—

Held, that the case was not one where an appointed arbitrator refused to act, or was incapable of acting, within the meaning of s. 5 (*b*) of the Arbitration Act, 1889, and therefore there was no jurisdiction to make the order.

In re Williams and Stepney ([1891] 2 Q. B. 257) distinguished.

APPEAL from the order of Collins, J., appointing an arbitrator.

In July, 1889, a contract was entered into between the appellants, Messrs. Wilson & Son, who were contractors, and the respondents the Eastern Counties Navigation Co., by which the appellants undertook to execute for the respondents certain works for the improvement of the navigation of a river. Clause 13 of the contract was as follows:—

"In case of any difference arising between the company and the contractors concerning the works, the difference shall be referred to Mr. Martineau, or, failing him, a person to be named

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by the president of the Institute of Civil Engineers, who shall be standing referee, and whose decision shall be final, &c., and the proceedings shall be conducted according to the Railway Arbitration Act, 1859." (1)

It was afterwards agreed that the arbitration should be conducted according to the Arbitration Act, 1889. (2)

Differences having arisen between the parties, Mr. Martineau, in February, 1891, made an award. Afterwards Mr. Martineau went to America, and during his absence (further differences having arisen) the company, without the consent of the contractors, applied to the president of the Institute of Civil Engineers to appoint another arbitrator, and the president appointed a member of the institute named Shelford. Mr. Shelford objected to act as arbitrator, unless appointed by a judge's order, and the company applied to Collins, J., who, on September 10, 1891, made the order now appealed against:— "That Mr. Shelford, M.I.C.E., or some other fit and proper person to be nominated by the president of the Institute of Civil Engineers, be appointed arbitrator and standing referee to deter-

(1) The "Railway Companies Arbitration Act, 1859," 22 & 23 Vict. c. 59.

(2) 52 & 53 Vict. c. 49:—

By s. 5: "In any of the following cases:—

(*a*) "Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen, concur in the appointment of an arbitrator.

(*b*) "If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not shew that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy

* * * *

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

"If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

By s. 25: "This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act."

mine certain disputes which have arisen and may arise between the company and Wilson & Son, in the place of Mr. Martineau, the former arbitrator or referee, on the ground that he has become incapable, through absence from England, of further acting as arbitrator; but this order is not to take effect if Mr. Martineau returns to England on or before October 8 next."

Mr. Martineau did not return to England until after October 8.

Channell, Q.C. (*Firminger*, with him), for the appellants. There was no jurisdiction to make the order. The temporary absence of Mr. Martineau, who was appointed "standing referee," did not justify the appointment of another arbitrator under clause 13 of the contract. The Arbitration Act does not apply, for it is not correct to say that the arbitrator "refuses to act, or is incapable of acting," within the meaning of s. 5 (*b*).

H. D. Greene, Q.C., and *J. D. S. Sim*, for the respondents. The order was rightly made. Whatever may be the effect of clause 13 of the contract, the case comes within the terms of s. 5 (*b*) of the Arbitration Act. That this is so is clear from the terms of s. 25, and the decision of the Court of Appeal: *In re Williams and Stepney.* (1)

MATHEW, J. I am of opinion that the learned judge had no jurisdiction to make the order which he has made in this case. The question is whether the case comes within the Arbitration Act, 1889 (52 & 53 Vict. c. 49). By the original contract Mr. Martineau was appointed standing referee to settle any differences which might arise from time to time between the parties. Certain differences arose, and Mr. Martineau made an award, and gave directions as to what was to be done. He then left this country and went to America. During his absence further differences arose, and the company then obtained from the president of the Institute of Civil Engineers the appointment of Mr. Shelford as arbitrator. Mr. Shelford hesitated to act until the order of a judge was obtained for his appointment, and accordingly an application was made to Collins, J., who made the order which is the subject of this appeal. The question turns on s. 5 of the Arbitration

(1) [1891] 2 Q. B. 257.

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Act, 1889. It is contended that Mr. Shelford refused to act within the meaning of sub-s. (*b*) of that section. I cannot agree with the view that he refused, but even if he had done so the proper course would have been to apply again to the president of the Institute of Civil Engineers, and obtain the appointment of some other person. It is argued that the judgment of the Court of Appeal in *In re Williams and Stepney* (1) amounts to a statement of the law to the effect that a submission may be overridden by the Act, but that case only decided that the Act might add things which were not in the submission, unless the intention that they should not be added was expressed. In the present case a contrary intention is expressed in the submission.

A. L. SMITH, J. I am of the same opinion. The sole point is whether Collins, J., had jurisdiction to make this order. In the first place it is contended that clause 13 of the contract only applies to the original appointment, but I am of opinion that it applies to all the different appointments which may become necessary as successive differences arise. Secondly, it is contended that the case of *In re Williams and Stepney* (1) decides that the Act of Parliament overrides the submission, but I am of opinion that it only decides that the Act applies so as to introduce certain provisions into a submission unless the contrary is provided. In the present case the contrary is provided. I think the true meaning of s. 5, sub-ss. (*a*) and (*b*), is that where the parties will not appoint an arbitrator, or an appointed arbitrator refuses to act, or is incapable of acting, or dies, and there is no machinery in the submission whereby an appointment can be obtained, there the judge may appoint an arbitrator. I agree, therefore, that the order for the appointment of Mr. Shelford as arbitrator must be set aside.

Appeal allowed.

Solicitors for appellants: *Harries, Wilkinson, & Raikes.*
Solicitors for respondents: *Lake, Beaumont, & Lake.*

(1) [1891] 2 Q. B. 257.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1891
Nov. 18.

WILLIAM RADAM'S MICROBE KILLER COMPANY, LIMITED *v.* LEATHER.

Practice—Appeal—New Trial—Assessment of Damages before Under-Sheriff and Jury—Supreme Court of Judicature Act, 1890 (53 & 54 *Vict. c.* 44), *s.* 1.

Where there has been a trial before the under-sheriff and a jury for the assessment of damages in an action in the High Court, an application for a new trial must be made, under s. 1 of the Supreme Court of Judicature Act, 1890, to the Court of Appeal, and not to a Divisional Court.

MOTION for a new trial.

The action was brought in the Queen's Bench Division by the plaintiff company to recover damages for the alleged negligence and improper conduct of the defendant as managing director of the company. The defendant not having appeared to the writ of summons, upon a writ of inquiry to the under-sheriff of Middlesex the plaintiff company's damages were assessed by the jury at one farthing.

The plaintiff now applied to the Court of Appeal, by way of appeal from the inquiry and assessment before the under-sheriff and jury, for a new writ of inquiry and assessment, on the ground that the damages given were not enough.

J. E. Palmer, for the defendant, took the preliminary objection that the inquiry and assessment of damages before the under-sheriff and jury did not constitute a trial of "any cause or matter, or of any issue therein with a jury, in the High Court," within the meaning of the Supreme Court of Judicature Act, 1890, s. 1, and therefore that the application for a new trial ought not to be made to the Court of Appeal in the first instance, but should have been made to a Divisional Court.

[He referred to *Pritchard* v. *Pritchard*. (1)]

McLaren, for the plaintiffs, was not heard on the preliminary objection.

(1) 14 Q. B. D. 55.

C. A. 1891

WILLIAM RADAM'S MICROBE KILLER CO. v. LEATHER.

LORD ESHER, M.R. We decide that, where there has been a trial before the under-sheriff and a jury in a cause which is a cause in the High Court, if fault be found with the verdict of the jury, the case must come here on appeal, and not go to a Divisional Court.

LOPES and KAY, L.JJ., concurred.

Objection overruled.

Solicitors for plaintiffs: *Minchin & Co.*
Solicitor for defendant: *Durant.*

W. A.

Nov. 19.

EX PARTE PULBROOK.

Practice—Appeal—Libel published in Newspaper—Order giving Leave to commence Criminal Prosecution—Criminal Proceedings—Law of Libel Amendment Act, 1888 (51 & 52 *Vict. c.* 64), *s.* 8—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 50—*Rules of Supreme Court*, 1883, *Order* LXVIII., *r.* 1.

An appeal does not lie from an order made by a judge at chambers under s. 8 of the Law of Libel Amendment Act, 1888, allowing a criminal prosecution to be commenced against the proprietor, publisher, editor, or person responsible for the publication of a newspaper, for a libel published therein.

APPEAL from Chambers.

Jeune, J., made an order that Anthony Pulbrook be at liberty to commence a criminal prosecution against C. W. Perryman pursuant to the Law of Libel Amendment Act, 1888, s. 8, for certain libels contained in various numbers of a certain newspaper called *The Financial Observer and Mining Herald.*

Perryman appealed from this order, and it was objected that the order was made in a criminal proceeding, and therefore no appeal would lie.

Cock, Q.C. (*Fulton* and *R. D. Muir*, with him), for the appellant. This is not a criminal proceeding, though it will become such at a later stage if the order is upheld. As yet it is merely a preliminary step. Sect. 47 of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), does not apply to appeals from Chambers, and therefore the decisions as to the meaning of the

words "criminal cause or matter" in that section are not in point. This is a "matter" within the meaning of s. 100 of the same Act, not a "cause" or "action," and a right to set aside or discharge the judge's order is given by the express terms of s. 50. This is not like the case of extradition, where the proceedings are criminal from the commencement.

Grain, for the respondent. No appeal lies, because this is a criminal proceeding. It is a preliminary step in a criminal matter. The judge must be satisfied, before he can make an order, that a primâ facie case has been made out that a criminal act has been committed.

[A. L. SMITH, J. If a judge allows bail, will an appeal lie from his order?]

The cases collected in Short and Mellor's Crown Practice at pages 510, 511, and 512, shew that no appeal lies in such a case. Sect. 8 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), which renders a judge's order a condition precedent to the commencement of a criminal prosecution against the proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for any libel published therein, provides that "such application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application." The use of the words "person accused" shews that the proceeding is criminal.

Cock, Q.C., replied.

[In addition to the cases referred to in the judgment, the following were cited: *Yates* v. *The Queen* (1); *Reg.* v. *Rudge* (2); *Reg.* v. *Justices of Central Criminal Court.* (3)]

MATHEW, J. This appeal must be dismissed, because the preliminary point must be decided against the appellant. The question arises under s. 8 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), which repeals 44 & 45 Vict. c. 60, s. 3, and enacts "that no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published

(1) 14 Q. B. D. 648. (2) 16 Q. B. D. 459.
(3) 18 Q. B. D. 314.

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therein without the order of a judge at chambers being first had and obtained. Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application." Mr. Cock relies on the use of the word "order" in this section, and refers to s. 50 of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), the effect of which, he contends, is that the order now before us may be set aside or discharged upon notice by this Court. Now, before the Judicature Acts came into operation there were no means of reviewing the decision of a judge at chambers in a criminal matter, and s. 50 of the Act of 1873 provides for the setting aside of a judge's order "according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned." Then by Rules of Supreme Court, 1883, Order LXVIII. r. 1, "Criminal proceedings" are excluded from the operation of the rules made under the Judicature Acts. The question, therefore, arises whether this order is a criminal proceeding. With regard to this point there are three decisions of the Court of Appeal, which turn upon the question as to what is a "criminal cause or matter" within the meaning of s. 47 of the Supreme Court of Judicature Act, 1873. The cases are: *Reg.* v. *Steel* (1); *Ex parte Woodhall* (2); and *Ex parte Schofield.* (3) In the last-mentioned case the Queen's Bench Division having refused to grant an order nisi for a mandamus to compel a stipendiary magistrate who had made an order, under s. 96 of the Public Health Act, 1875, for the abatement of a nuisance, to state a case for the opinion of the Court, the applicant moved, ex parte, by way of appeal from the Queen's Bench Division for an order nisi in the Court of Appeal; and it was held that the decision of the Queen's Bench Division was given in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and therefore, that the Court of Appeal had no jurisdiction to entertain the application for a mandamus.

It is not necessary to read the whole of the judgments delivered, but there is one passage in the judgment of Lord Esher, M.R.,

(1) 2 Q. B. D. 37. (2) 20 Q. B. D. 832.
(3) [1891] 2 Q. B. 428.

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which has an important bearing on the question now before the Court. He said: "In *Ex parte Woodhall* (1), the Court of Appeal advisedly dealt with this question of jurisdiction generally. In my judgment, I say, We consider that we ought not any longer to flinch from determining whether we have, or have not, jurisdiction to hear an appeal in such a case as this, and we desire to rest our decision, not upon the facts of the particular case, but upon the determination of the question of jurisdiction." The Court, therefore, deliberately undertook to decide when there was, and when there was not, jurisdiction in such cases, and the judgment proceeds: "The result of all the decided cases is to shew that the words 'criminal cause or matter,' in s. 47, should receive the widest possible interpretation. The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term, this Court being constituted for the hearing of appeals in civil causes or matters;" and, at page 836 of the report, I say: "In the present case I think I must try to express my meaning in other words,"—i.e., other than had been used in previous cases. "I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject matter of which is criminal, at whatever stage of the proceedings the question arises." (2)

Mr. Cock argues that in the present case the order is not a criminal proceeding, because it is a preliminary step, and criminal proceedings cannot be commenced until the order of a judge at chambers has been obtained, but that argument is met by the decision of the Court of Appeal in *Ex parte Woodhall*. (1)

For these reasons I am of opinion that no appeal lies.

A. L. SMITH, J. I am of the same opinion. This is an appeal from the order of Jeune, J., allowing a prosecution for libels alleged to have been published in a newspaper. Before 1888 proprietors, publishers, and editors of newspapers were protected by s. 3 of the Act of 1881 (44 & 45 Vict. c. 60), which made the fiat of the director of public prosecutions a condition precedent to a prosecution for libel. No one could doubt that while that

(1) 20 Q. B. D. 832.

(2) [1891] 2 Q. B. at pp. 430, 431.

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A. L. Smith, J.

section was in force if the fiat were granted no appeal would lie. That section was repealed by s. 8 of the Act of 1888 (51 & 52 Vict. c. 64), which enacts that the order of a judge at chambers must be obtained. It is true, as was pointed out by Mr. Cock, that in the section now in force the word used is "order," not "fiat" as in the earlier enactment, and it is urged that this is an order from which an appeal is given by s. 50 of the Supreme Court of Judicature Act, 1873. The first question which we have to decide is whether the order of Jeune, J., was made in a criminal proceeding, and with regard to this question it is important to observe that the Act of 1888 provides that the application is to be made "on notice to *the person accused*"; the expression is not even "the defendant." I agree with Mr. Cock that s. 47 of the Supreme Court of Judicature Act, 1873, does not apply to appeals from Chambers, but the decisions on that section are important with regard to the question whether this is a criminal proceeding; [the learned judge read the passage from the judgment in *Ex parte Schofield* (1) set out in the preceding judgment.] It is contended that this is not a criminal proceeding because there can be no prosecution until after an order has been obtained. I do not agree with this contention, for when the application is made I think a step is taken in a criminal proceeding. Sect. 50 of the Supreme Court of Judicature Act, 1873, is the only provision which could possibly give us jurisdiction to entertain this appeal, but I do not agree that it does so. Before the Judicature Rules were made there was no appeal from the decision of a judge in a criminal case. The only cases in which a decision could be reviewed were where there was error on the record or where a case was stated for the Court for Crown Cases Reserved. Assuming this to be a criminal proceeding I cannot see how it can be held that s. 50 of the Supreme Court of Judicature Act, 1873, gives an appeal, for that section provides for setting aside or discharging orders "according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned." These words are inapplicable to criminal proceedings, and must have been intended to apply to civil proceedings, in

(1) [1891] 2 Q. B. 428.

which there was a "course and practice" with regard to setting aside and discharging orders, not to criminal proceedings, in which no such "course and practice" existed. I am of opinion that, having regard to the provisions of s. 50 of the Supreme Court of Judicature Act, 1873, and Rules of Supreme Court, 1883, Order LXVIII., this is an appeal in a criminal proceeding, which the Court has no jurisdiction to entertain.

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EX PARTE PULBROOK.

A. L. Smith, J.

Appeal dismissed.

Solicitors for appellant: *Vernon & Sons.*

Solicitors for respondent: *Wontner & Sons.*

P. B. H.

IN RE AN ARBITRATION BETWEEN BENJAMIN SHAW AND THOMAS RONALDSON.

Nov. 23.

Practice—Arbitration—Commission to examine Witnesses—Jurisdiction to issue commission where Arbitration by agreement of the Parties—Ord. XXXVII., r. 5—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 100—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 1.

Where parties agree to refer their disputes to arbitration, no action having been brought in respect of those disputes, the Court or a judge has no power under Order XXXVII., r. 5, to order the issue of a commission for the examination of witnesses in the matter referred to arbitration.

APPEAL from a decision of Collins, J., at chambers.

By a contract entered into between Benjamin Shaw and Thomas Ronaldson, the latter agreed to carry apples for Shaw from ports in Nova Scotia to the United Kingdom, during the apple season of 1889–1890. Disputes arose between the parties to the contract with respect to some of the shipments, Shaw claiming damages from Ronaldson for delay in the delivery of a quantity of the apples shipped at Nova Scotia, by reason of which delay he alleged that he had lost the Christmas market of the year 1889.

By an agreement in writing, dated October 8, 1890, Shaw and Ronaldson agreed that all disputes arising out of the contract, and the claim for damages made by Shaw, should be referred to two arbitrators, and in case of difference to an umpire to be appointed by them.

The arbitrators held several meetings, and in the course of the proceedings Shaw desired to support a claim for damages

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for the deterioration of the apples before shipment at Nova Scotia, and an application was made on his behalf to Collins, J., at chambers, for an order for the issue of a commission to examine witnesses at Nova Scotia with respect to such deterioration.

Collins, J., declined to make the order on the ground that he had no jurisdiction, and Shaw appealed.

Tindal Atkinson, for the appellant. The learned judge at chambers was wrong in coming to the conclusion that he had no power to order the issue of a commission in this case. Order XXXVII., r. 5, gives the power "in any cause or matter," and it is submitted that this is a "matter" within the meaning of the rule. "Matter" is defined by s. 100 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), thus: "'matter' shall include every proceeding in the Court not in a cause," and a submission to arbitration by the voluntary agreement of the parties is made a "proceeding in the Court" by s. 1 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), which enacts that "a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court." The effect of that section is to place the proceeding on the same footing as a compulsory reference under the order of the Court or a judge. In *In re Mysore West Gold Mining Co.* (1), which was cited at chambers, the point in question here was not raised.

Manisty, for the respondent. This is not a "matter" which is "a proceeding in the Court" within Order XXXVII., r. 5, and s. 100 of the Judicature Act, 1873. There is, therefore, no jurisdiction to order the issue of a commission in it. Sect. 1 of the Arbitration Act, 1889, does not make it a proceeding in the Court, the effect of that section being merely to do that which would have been done if the agreement for reference had contained a provision that the submission might be made a rule of Court. The Court has not adjudicated upon the matter at all.

Tindal Atkinson, in reply.

MATHEW, J. I am of opinion that this appeal should be dismissed. [The learned judge stated the facts.] My brother

(1) 42 Ch. D. 535.

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Mathew, J.

Collins at chambers was of opinion that he had no power to make an order for the issue of a commission in this case, and I am clearly of opinion that he was right. It was contended on behalf of Shaw that the power was given by Order XXXVII., r. 5, which provides that "the Court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice," make an order for the examination upon oath of any witness or person before the Court or judge, or any officer of the Court, or any other person, and at any place. It is conceded that the proceeding in question here is not a "cause," but it is contended that it is a "matter" within the meaning of the rule. By the Judicature Act, 1873, s. 100, "matter" shall include "every proceeding in the Court not in a cause." Is this arbitration a "proceeding in the Court" within the meaning of that section? It is most clearly a proceeding not in the Court. The very purpose of the submission to arbitration is to take the matter away from the jurisdiction of the Court. Next, it was urged that the effect of the Arbitration Act, 1889, s. 1, was to make this submission to arbitration a proceeding in the Court. Sect. 1 enacts that "a submission, unless a contrary intention appears therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court." Does that enactment alter the definition of the word "matter" in s. 100 of the Judicature Act, 1873? I think that it clearly does not. The object of s. 1 of the Arbitration Act, 1889, is, first, to make a submission irrevocable except with leave; and, secondly, to give the same power of enforcing the arbitrator's award as existed formerly where, by virtue of the agreement between the parties, a submission might be made a rule of Court. I am of opinion that this clearly was not a "matter" within Order XXXVII., r. 5, and s. 100, of the Judicature Act, 1873, and the judge at chambers had, therefore, no power to order the issue of a commission in it.

COLLINS, J., concurred.

Appeal dismissed.

Solicitor for appellant: *Seaton F. Taylor.*

Solicitors for respondent: *W. A. Crump & Son.*

W. A.

C. A.
1891
Nov. 9.

[IN THE COURT OF APPEAL.]

BIRD *v.* BARSTOW.

Practice—Married Woman—Action on Covenant by—Money brought into Court under Order XIV.*—Right of successful Plaintiff to Money so brought in.*

In an action against the defendant, a widow, on a covenant for payment of money entered into by her when she was a married woman, the plaintiff applied for leave to sign judgment under Order XIV. An order was made giving the defendant leave to defend on bringing into Court 500*l.*, which she accordingly did. On the trial of the action the judge gave judgment for the plaintiff, but directed that the money should remain in Court pending an inquiry whether the defendant had separate property available in execution:—

Held, that the meaning of the order under Order XIV. was that the money was to be brought into Court to abide the event, and that the plaintiff being successful was entitled to have the money forthwith paid out to him.

APPEAL from the refusal by Charles, J., to order payment out of Court to the plaintiff of a sum of 500*l.*

The facts were as follows:—The action was upon a covenant by the defendant for payment of a sum of 500*l.* At the time when the covenant was entered into, the defendant was a married woman, but before the action she had become a widow. An application being made by the plaintiff at chambers, under Order XIV., for leave to sign judgment, it was ordered that the defendant should have leave to defend on bringing into Court the sum of 500*l.* The defendant accordingly paid 500*l.* into Court. She pleaded by way of defence (inter alia) a denial that she had any separate property not subject to restraint on anticipation at the time when she entered into the covenant. At the trial before the learned judge without a jury, evidence was given shewing that she had such separate property to the extent of 1500*l.* when she entered into the covenant. The learned judge gave judgment for the plaintiff according to the form settled in *Scott* v. *Morley* (1), and directed an inquiry before a master "whether the defendant has now any and what separate estate, and of what it consists, and from what it has arisen, and in whom the same is vested, and whether the same is in any and what manner, and to

(1) 20 Q. B. D. 120.

what extent, subject to any restraint on anticipation, or is charged or liable to the payment of any and what debts or charges," and that the sum of 500*l.* should remain in Court pending the inquiry. Against this latter portion of his judgment the plaintiff appealed.

McCall, Q.C., and *Guiry*, for the plaintiff. The meaning of such an order as was made in this case under Order XIV. is that the money is to be paid into Court to abide the event, and, on the plaintiff's succeeding in the action, he is entitled forthwith to have the money paid out. The defendant should have taken the point that she had no property available for execution on the application under Order XIV. She might have appealed against that order, but did not. She cannot obtain leave to defend on payment of the money into Court, and then be heard to say that the money is not available to satisfy the plaintiff's judgment. The fact that the execution on the judgment in an action on a covenant by a married woman is limited to separate estate not subject to restraint on anticipation cannot affect the right of the plaintiff when successful to have the money brought into Court under Order XIV. paid out to him. When money is paid in under such an order, it is paid in on the footing that it is available to satisfy any judgment the plaintiff may obtain.

[They referred to *Palliser* v. *Gurney* (1); *Pelton* v. *Harrison* (2); *Culverhouse* v. *Wickens* (3); *Ex parte Banner*. (4)]

Godefroi, for the defendant. The order making payment into Court a condition of leave to defend under Order XIV., and payment of such money accordingly, cannot have the effect of increasing the defendant's liability. Such money ought not to be paid out to the plaintiff unless on the inquiry it appears that there is property subject to the liability to satisfy the covenant by the married woman. The effect of ordering it to be paid out at once may be that, instead of making the sum covenanted to be paid a charge on the defendant's property legally subject to such liability, the defendant is treated as

(1) 19 Q. B. D. 519.
(2) [1891] 2 Q. B. 422.
(3) Law Rep. 3 C. P. 295.
(4) Law Rep. 9 Ch. 379.

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personally liable for a debt, as if she had been a feme sole when she entered into the covenant.

[He cited *Pelton* v. *Harrison* (1); *Draycott* v. *Harrison*. (2)]

McCall, Q.C., was not called on to reply.

LORD ESHER, M.R. In this case, the defendant being sued, an application was made at chambers, under Order XIV., for leave to sign judgment against her. An order was thereupon made to the effect that, on condition that she paid 500*l.* into Court, she might defend the action, but, unless she complied with that condition, judgment might be signed against her. The meaning of such an order, in my opinion, is to give security to the plaintiff that, if he succeeds in the action, he shall obtain the fruits of success. The defendant did not object to the order and say that it ought not to have been made, because the claim was on a contract that she made when she was a married woman. She accepted the indulgence given to her. The question is really on what condition she obtained it. It appears to me that the condition is that, if the plaintiff succeeds in the action, the money brought into Court shall be his, so far as it may go to satisfy the judgment which he has obtained, and that the defendant cannot be heard to deny his title to it. It is paid into Court and received by the Court in order to secure the plaintiff in obtaining satisfaction of a judgment, if he obtains one, and on the terms that, if he does, it shall be paid out to him, so far as it goes, to satisfy that judgment. Now the defendant comes forward, having taken her chance of succeeding in her defence to the action, and in effect says, though this money was paid into Court to hold as security for the plaintiff, it was really no security at all, because it can be shewn on the inquiry directed that it was not money available to satisfy the judgment. I am of opinion that, in the case of money so paid in, the Court cannot enter into any such inquiry, and ought to order the money to be paid out to the plaintiff. For these reasons, it seems to me that the learned judge ought to have ordered the money to be paid out to the plaintiff, and therefore the appeal should be allowed.

(1) [1891] 2 Q. B. 422.

(2) 17 Q. B. D. 147.

FRY, L.J. I am of the same opinion. In substance this order was that the money should be paid into Court to abide the event. I think that we cannot hear argument to shew that, though the event has gone against the party who paid it in, it ought not to be paid out to the successful party. In effect, the defendant purchased the right to defend the action by the payment into Court, and cannot be heard to say that such payment was of no value to the plaintiff.

LOPES, L.J., concurred.

Appeal allowed.

Solicitors for plaintiff: *Taylor, Stileman, & Underwood.*
Solicitors for defendant: *Valpy, Chaplin, & Peckham.*

E. L.

IN RE NOYCE. *Oct.* 30.

County Court—Lunatic — Jurisdiction — Vesting Order — Power to make— County Court Judge—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 132, 133.

A county court judge has no jurisdiction under the Lunacy Act, 1890, to make a vesting order with regard to stock standing in the name of a lunatic.

APPEAL by the governor and company of the Bank of England from the order of the judge of the Bow County Court, directing that certain stock standing in the name of Jane Noyce, a pauper lunatic, be transferred, and the dividends paid, to Frederick Edward Hilleary, the clerk to the guardians of the West Ham Union. The order directed "that the secretary, deputy-secretary, or accountant-general for the time being, of the governor and company of the Bank of England, do transfer into the name of the plaintiff, Frederick Edward Hilleary, the sum of 157*l.* 0*s.* 2*d.*, 2*l.* 15*s.* per Cent. Consolidated Annuities, standing in the books of the governor and company of the Bank of England, in the name of the said Jane Noyce, and also do pay to the said Frederick Edward Hilleary the dividends now due, or to accrue due, on the said annuities." (1)

(1) Sect. 132 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), gives power to county court judges to make certain orders with regard to the property of lunatics, of the value of less than 200*l.*

By s. 133: "Where any stock is standing in the name of or is vested

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IN RE NOYCE.

Latham, Q.C. (*Howard Wright*, with him), for the appellants. Sect. 132 of the Lunacy Act, 1890, is the only section giving power to county court judges to make orders with regard to the property of lunatics, and that section gives no power to make a vesting order. Such an order can be made under s. 133, but it must be made by the judge exercising jurisdiction in lunacy, which does not include a county court judge. An order may be obtained by summons at a trifling expense.

Finlay, Q.C. (*Morten*, with him), for the respondent. There is jurisdiction to make the order, the value of the property affected by it being under 200*l.*

Latham, Q.C., replied.

MATHEW, J. In order that the stock in question may be transferred, it is necessary that there should be a vesting order, but s. 132 of the Act of 1890, which is the section giving jurisdiction to the county court judge, applies to property other than that property as to which a vesting order can be made. The appeal must be allowed.

A. L. SMITH, J. Sect. 132 alone gives whatever power the county court judge has to make orders with respect to the property of lunatics, and where a vesting order is made, s. 133 provides that the order is to be made by the judge exercising jurisdiction in lunacy.

Appeal allowed. (1)

Solicitors for the appellants: *Freshfields & Williams.*

Solicitor for the respondent: *Hilleary.*

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in a lunatic beneficially entitled thereto, or is standing in the name of or vested in a committee of the estate of a lunatic so found by inquisition, in trust for the lunatic, or as part of his property, and the committee dies intestate, or himself becomes lunatic, or is out of the jurisdiction of the High Court, or it is uncertain whether the committee is living or dead, or he neglects or refuses to transfer the stock, and to receive and pay over the dividends thereof, as the judge in lunacy directs, then the judge may order some fit person to transfer the stock to or into the name of a new committee, or into court, or otherwise, and also to receive and pay over the dividends thereof in such manner as the judge directs."

(1) The Court was informed on a subsequent day that the order could not be obtained by summons, and that the expense of a petition to the judge in lunacy would be considerable. Leave was given to appeal.

P. B. H.

BURKILL *v.* THOMAS.

1891
Nov. 28.

County Court—Transfer of Actions—Jurisdiction of Judge in Chambers to send Actions of Contract for Trial in County Court—The County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *ss.* 65, 74—"*Court in which Action might have been commenced, or in any Court convenient thereto.*"

Sect. 65 of the County Courts Act, 1888, gives power to a judge in chambers to send actions of contract in which the claim either did not originally exceed 100*l.*, or has been reduced in the prescribed manner to a sum not exceeding 100*l.*, for trial in the county court "in which the action might have been commenced, or in any court convenient thereto," and by s. 74 an action may be commenced in the county court of the district in which the defendant, or one of the defendants, dwells or carries on business, or, by leave, in the court of the district in which the cause of action wholly or in part arose. The plaintiff in an action of contract, in which the claim did not exceed 100*l.*, dwelt in Yorkshire, and the defendant dwelt and carried on business in Westminster. The cause of action arose partly within the county court district in which the plaintiff dwelt.

Held, by Lord Coleridge, C.J., and Mathew, J., that the words of s. 65 "or in any court convenient thereto" gave the judge in chambers jurisdiction to send the action for trial in any county court which in his opinion was "convenient" having regard to the convenience of the parties, and therefore that he could properly exercise that jurisdiction by sending the action for trial in the county court of Yorkshire:

Held, also, by Mathew, J., that s. 65 gave the judge in chambers power to send the action for trial in any county court in which it could only have been commenced by leave under s. 74.

MOTION by way of appeal from an order of Vaughan Williams, J., made in chambers.

This was an action of contract brought in the High Court to recover a sum not exceeding 100*l.* The plaintiff resided and carried on business at Thorne in Yorkshire, and the defendant in Westminster. The cause of action arose partly within the district of the county court of Thorne. The plaintiff applied at chambers for an order that the action should be tried in the county court of Thorne, and the learned judge made an order to that effect, being of opinion that it was a county court in which the action might have been commenced within the meaning of s. 65 (1) of the County Courts Act, 1888 (51 & 52 Vict c. 43). The defendant appealed.

(1) The County Courts Act, 1888 (51 & 52 Vict. c. 43), provides:—Sect. 65: "Where in any action of contrac brought in the High Court the clair

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Courthope Munroe, for the defendant. The question is whether, under s. 65 of the County Courts Act, 1888, an action can be remitted to any county court except that within the district of which the defendant, or one of the defendants, dwells or carries on business, or in some court adjacent thereto. The words of s. 65, "any court in which the action might have been commenced," mean only a court in which the action might have been commenced as of right without leave or agreement, because the leave of the judge or registrar of the county court cannot have been given before the application to remit is made, and it cannot be presumed that leave would have been given. If an action could be remitted to any county court which has jurisdiction by agreement, under s. 64 (which enacts that with respect to actions in the Queen's Bench Division, if the parties so agree by a memorandum in writing, the judge of any county court named in the memorandum shall have power to try the action), there would be no limitation whatever, and it would be necessary to construe s. 65 as meaning simply "any court." In *Curtis* v. *Stovin* (1), the Master of the Rolls says that these words "must refer to the county court in the district of which the parties reside, or in which one of them resides." In a case which is fully reported only in the *County Courts Chronicle*, Cave, J., expressed the opinion that these words meant only any court in which the action might have been commenced as of right without leave or agreement: *Parsons* v. *Lakenheath School Board*. (2) The same view has been taken by Collins, J., at

indorsed on the writ does not exceed 100*l*. . . . it shall be lawful for either party to the action at any time to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto."

Sect. 74: "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the court within the district of which the defendant, or one of the defendants, dwelt or carried on business, at any time within six calendar months next before the time of commencement, or, with the like leave, in the court in the district of which the cause of action or claim wholly or in part arose."

(1) 22 Q. B. D. 513, 517.

(2) *County Courts Chronicle*, June 1, 1889, p. 127; Annual Practice, 1890, p. 174.

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chambers. The subsequent words "or in any court convenient thereto," are words of locality and mean a court adjacent or near to the court in which the action might have been commenced: "thereto" refers to the last antecedent, which is "court." That was the view taken in *Curtis* v. *Stovin* (1), by the Master of the Rolls, who said (2): "The alternative clause which follows, 'or in any court convenient thereto,' helps us in the construction, inasmuch as it refers to locality," and by Fry, L.J., who said (3): "this view of the construction is fortified by the words which follow, 'or in any court convenient thereto,' which are plainly words of locality." If these words are construed to mean "convenient to the parties," the previous words are useless, for an action can be remitted to any court in the country without considering where it might have been commenced. The judge in chambers, upon this point, decided that the words "convenient thereto" were words of locality, and meant a court near or adjacent to one in which the action might have been commenced.

Ernest Pollock, for the plaintiff. This action might have been commenced, with leave of the judge or registrar, in the county court of Thorne, and was therefore properly remitted to that court; the judge of the High Court may properly come to the conclusion that leave would probably have been given to bring the action in the county court in the district of which the cause of action arose, and make an order remitting it to that court. This order was also properly made remitting the action to a court "convenient thereto," that is, to a court convenient to the parties. In the case of *Parsons* v. *Lakenheath School Board* (4), as reported in the Times Reports, Field, J., took the view that the words "convenient thereto" had reference to the convenience of the parties.

LORD COLERIDGE, C.J. We have to decide this point upon the construction of words which several judges have already pronounced to be difficult to understand, and undoubtedly are so. The words are contained in s. 65 of the County Courts Act,

(1) 22 Q. B. D. 513.
(2) 22 Q. B. D. at p. 517.
(3) 22 Q. B. D. at p. 519.
(4) 5 Times Rep. 497.

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Lord Coleridge, C.J.

1888 (51 & 52 Vict. c. 43), which provides that certain actions may be remitted "to be tried in any court in which the action might have been commenced, or in any court convenient thereto," and the question is whether the master or the judge had power to remit this action to the county court of Yorkshire. The opinion of one learned judge, Cave, J., is reported to the effect that the words "any court in which the action might have been commenced" are to be limited to any court in which the action might have been commenced as of right, without leave or agreement of the parties: *Parsons* v. *Lakenheath School Board.* (1)

It is not, however, necessary for me to say in this case whether I concur in that construction of the Act; it has never been expressly so decided, and we can safely decide this case upon another ground. I feel considerable doubt whether the opinion of Cave, J., was correct. There are the further words "convenient thereto," and I agree with Cave, J., that the word "thereto" would seem to be a word of locality with reference to the court; but one court cannot be convenient to another court, so it is impossible to give that meaning to these words; the word "convenient" must be applied to persons and to parties. The question, therefore, is whether we may practically reject the word "thereto" altogether. We have some authority for dealing with the section in that way, for the Court of Appeal in *Curtis* v. *Stovin* (2) added words to the section in order to make it intelligible. If, therefore, no adequate meaning can be given to the word "thereto" by applying it to the last antecedent, "the court," which would give an absurd meaning, and if "convenient" and "adjacent" are not convertible terms, as in my opinion they are not, I think we may reject the word "thereto" as meaningless, unless we consider it as referring to the parties to the action. If, then, "convenient" means convenient to the parties, the judge has a discretion to exercise upon the question of convenience which must vary according to the circumstances of each case. I come, therefore, to the conclusion that the judge had power to remit this action to the County Court of Yorkshire, that court being a convenient one for the trial, and that there is

(1) *County Courts Chronicle*, June 1, 1889, p. 127. (2) 22 Q. B. D. 513.

no ground for overruling the exercise of his discretion, which I think was properly exercised.

MATHEW, J. I arrive at the same conclusion upon either part of the section, and think that there was power to remit this action to Yorkshire, either under the words "any court in which the action might have been commenced," or under the words "any court convenient thereto." At chambers, Vaughan Williams, J., thought that the action was one which might have been commenced in Yorkshire within the meaning of the section, and affirmed the order of the master. We are informed, however, that he was of opinion that the words "convenient thereto" referred only to locality, and it seems that Cave, J., expressed an opinion that the words "any court in which the action might have been commenced" meant any court in which the action might have been commenced as of right. I do not agree with that view, and think that there is no difficulty in the way of a master deciding that in any particular case the registrar of the county court might properly have given leave, and, acting upon that view, the master may remit the action to that court whenever he thinks that the registrar would have given leave. I also think that the word "thereto" must be altogether rejected, as the word "convenient" must mean convenient to the parties to the action.

Appeal dismissed.

Solicitors for the plaintiff: *Crowders & Vizard, for Burtonshaw & Tovey, Doncaster.*

Solicitor for the defendant: *J. J. Chapman.*

W. A.

1891
Nov. 13.

PAYNE, Appellant; WRIGHT, Respondent.

Metropolis Building Acts — Roof of Building — Incombustible Materials — Material partly Combustible and partly Incombustible — Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *s.* 19, *sub-s.* 1.

The Metropolitan Building Act, 1855, s. 19, sub-s. 1, provides that the roof of every building shall be covered externally with "slates, tiles, metal, or other incombustible materials."

The roof of a building was covered externally with materials consisting of woven iron wire coated with an oleaginous compound. The coating would ignite and burn away, leaving the wirework uninjured:—

Held, that the roof was not covered with "incombustible materials" within the meaning of the Act.

Case stated for the opinion of the Court by a metropolitan police magistrate.

The respondent, the managing director of the New Wire Wove Roofing Co., was summoned by the appellant, who was district surveyor under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), for having covered the roof of a building externally with a combustible material, contrary to the provisions of s. 19, sub-s. 1 (1), of that Act. A notice in writing was duly given by the appellant to the respondent requiring him to do such things as were required to be done by the Act, but he did not comply therewith.

The respondent, as managing director of the company, had covered the roof of a building externally with a material known as "Duroline," manufactured by the company. The building was intended for use as a store-room or greenhouse, and would in the ordinary course of things be covered with glass.

The material called "Duroline" was composed of woven iron wire coated with an oleaginous compound, which was entirely

(1) The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), provides:—

Sect. 19. "The roofs of buildings shall be constructed as follows—that is to say:—

"1. The flat, gutter, and roof of every building, and every turret, dormer, lantern light, skylight, or other erection placed on the flat or roof thereof, shall be externally covered with slates, tiles, metal, or other incombustible materials, except the doors, door frames, windows, and window frames of such dormers, turrets, lantern lights, skylights, or other erections."

waterproof and semi-transparent, and was used at several large buildings in the metropolis, and extensively in other parts of the country, as a substitute for glass.

It was proved by experiment before the magistrate, and by the evidence of witnesses, that if a light be applied to the edge of a piece of the material the coating or oleaginous compound would ignite and burn away, leaving the wirework, which was the foundation, uninjured, and that the material when in a flat position could be ignited by pieces of hot coal or a lighted stick being placed upon it, and that it was purely a question of the heat of the coal or the amount of flame or heat from the stick whether the material would ignite or not; but that the longer the material was exposed to the air the more difficult it was to ignite it, and that a piece which had been in use between four or five years did not ignite when pieces of live coal were placed upon it in two places. When subjected to a temperature of 320 degrees Fahr., the material gave off inflammable vapour; and when placed in a crucible it burst into flame five seconds before wood shavings under similar conditions.

There was no evidence that any fires had either been caused or aggravated in the metropolis by the use of "Duroline," and it was the opinion of expert witnesses who were called that the material was safer than glass as a protection from fire when used on skylights, because lighted objects which would fall through glass would not fall through the wire foundation of the material, and because, in the case of a fire inside the building, although the oleaginous coating might be consumed, the wire network would remain, and would prevent the rush of flame through.

The appellant contended that as the material was, under certain circumstances, capable of being ignited and burnt, it was not an incombustible material within the meaning of the Act. The respondent contended that the material as a whole was not capable of being consumed by fire, and was therefore incombustible within the meaning of the Act.

The magistrate found as a fact that part of the material, that is to say the oleaginous coating, was combustible, and that part of it, that is to say the wire network, was incombustible, and held, having regard to the object and purposes of the Act, that

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the material as a whole was an incombustible material within the meaning of the Act.

Horace Avory, for the appellant. The "other materials" mentioned in sub-s. 1 of s. 19 of the Metropolitan Building Act, 1855, must be ejusdem generis with "slates, tiles, metal," the materials specified in the section.

[A. L. SMITH, J. Surely glass will do, and that is not ejusdem generis with the materials specified.]

The word "incombustible' does not mean some material which cannot be entirely consumed by fire, but a material which will not ignite. The magistrate has found that this material will ignite, and that it will burst into flames, and it is therefore not incombustible. The word "incombustible" is used also in sub-ss. 11 and 13 of s. 20, in relation to the materials to be used for the hearth or slab of a chimney, and the setting thereof. In those cases it is clear that such a material as this would be improper.

Cutler, *Q.C.*, and *C. F. Gill*, for the respondent. The statute provides that "slates, tiles, metal, or other incombustible materials" may be used. "Metal" has been used in the present case, and from the facts stated it appears that the metal is not made any less incombustible by the use of the oleaginous substance. By the use of this metal covering the statute has, therefore, been complied with; for the incombustible character of the metal wire netting has not been affected by the application of this compound. The case states that this material is safer than glass, and it is conceded that glass may be used for covering a roof, though it is not mentioned in the statute; materials which may be invented as a safe substitute for glass are, therefore, reasonably such as are allowed by the Act.

MATHEW, J. I can well understand why the magistrate hesitated to convict in this case, for he found as a fact, upon strong evidence, that the material was a safe one to use. The findings of the magistrate seem, however, themselves to answer the question put to us, for he finds as a fact that the material was partly combustible and partly incombustible. Upon those

findings how is it possible for us to say that, as a matter of law, this material was incombustible within the meaning of the Act? Sect. 19 of the Metropolitan Building Act, 1855, says that "the roof of every building shall be . . . . externally covered with slates, tiles, metal, or other incombustible materials." The material used here was wire netting covered with an oleaginous substance, and covered, therefore, with a combustible material within the meaning of the Act. That is found by the magistrate, who says that the coating will ignite and burst into flames. The inference from those findings is irresistible that this is not an incombustible material. It is true that the magistrate finds that this material is, for some reasons, safer than glass, but that does not make it incombustible. The magistrate ought to have convicted, and the case must be remitted to him with our opinion to that effect.

A. L. SMITH, J. I am compelled to come to the same conclusion by the terms of the Act and the facts stated. Sect. 19 provides that the roof of every building shall be covered externally with slates, tiles, metals, or other incombustible materials. Does that mean "other materials" which are wholly incombustible, or materials which are partly combustible and partly incombustible? In my opinion it means materials wholly incombustible. The magistrate has found that this material is partly incombustible and partly combustible, and this appears clearly from the specimens which have been exhibited, and from the facts stated. Upon these facts it is impossible to say that this material is not partly combustible; it is, therefore, not an incombustible material within the meaning of the Act.

Appeal allowed.

Solicitor for appellant: *W. A. Blaxland.*

Solicitor for respondent: *W. Doveton Smyth.*

W. A.

C. A.
1891
Dec. 1.

[IN THE COURT OF APPEAL.]

GRANT *v.* ANDERSON & Co.

Practice—Writ of Summons—Service—Partnership Firm—Foreign Partnership—"Carrying on Business within the Jurisdiction"—Place of Business—Order XLVIII. *A., rr.* 1, 3.

Order XLVIII. A., r. 1, provides that persons liable as co-partners and carrying on business within the jurisdiction may be sued in their firm name, and rule 3 of the same order provides for service of the writ in such cases at the principal place within the jurisdiction of the business of the partnership upon any person having the management of the business there.

The defendants were a firm of manufacturers carrying on business in Glasgow, all the members of which were domiciled and resident in Scotland. They employed an agent in London to procure orders for them on commission. For that purpose he occupied an office in London, the rent of which he paid himself, and at which he kept samples of the defendants' goods. His duty was to receive and transmit orders to the defendants at Glasgow, and he had no authority to conclude contracts for the defendants, except upon express instructions. A writ was issued against the defendants in the name of their firm, and served upon the agent at the above-mentioned office:—

Held, by the Court of Appeal (affirming the Queen's Bench Division), that the defendants did not carry on business, and had no place of business, within the jurisdiction, and therefore the writ and service must be set aside:—

Held, by the Queen's Bench Division, that Order XLVIII. A, rr. 1, 3, have no application to actions against foreign firms, the members of which are domiciled and resident out of the jurisdiction.

MOTION to set aside the writ and service of the same and all subsequent proceedings in the action.

The facts were as follows:—The defendants were a firm of woollen manufacturers carrying on business in Glasgow, all the partners of which firm were domiciled and resident in Scotland. They employed one McCallum as their agent in London to procure orders for them, his remuneration consisting of a commission on business done. For that purpose McCallum occupied an office at 2, Milk Street Buildings, Cheapside, the rent of which he paid. The office consisted of two small rooms, one of which was used as a sample room. On the door-post at the outer entrance to the premises there was a brass plate bearing the name of "William Anderson & Co., Glasgow," with McCallum's

name underneath, and the same appeared on a board on the stairs leading to the office, while on the front windows of the office there were the words "William Anderson & Co., Manufacturers, Glasgow." In the headings of some of the memorandum paper used by the defendants, below the words "From Wm. Anderson & Co., 16, Princes Square, Glasgow," there occurred in smaller type, in some cases the words, "London, 2, Milk Street Buildings, Cheapside," and in others the words, "London Warehouse, 2, Milk Street Buildings, Cheapside." McCallum's sole business was that of obtaining orders for the defendants' goods; but he had no power to conclude any contracts between the defendants and their customers, except upon express instructions from the defendants, and it was his duty upon receipt of any orders to remit them to Glasgow for instructions, and in most cases upon the remission of such orders the further negotiation of the contracts was conducted directly by the defendants themselves.

The plaintiff gave McCallum an order for goods, which order was remitted by him to Glasgow, and accepted by the defendants there. The action was brought for breach of that contract. The plaintiff obtained the issue of a writ for service within the jurisdiction, the writ being directed to the defendants in their firm name, and caused it to be served upon McCallum at his office at Milk Street Buildings, as being the person alleged to have the management of the partnership business there under Order XLVIII. A, r. 3. The defendants moved to set aside the writ and service. (1)

(1) Order XLVIII. A, r. 1, provides that any two or more persons claiming or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action, &c. Rule 3 of the same order provides that, where persons are sued as partners in the name of their firm under r. 1, the writ shall be served either upon any one or more of the partners, or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there: and, subject to these rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary.

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W. S. Robson, for the defendants. Service of a writ upon a partnership can not be effected in the manner pointed out by rule 3 of Order XLVIII. A, except where the partners are sued under rule 1, and that can only be where the partners "carry on business within the jurisdiction," which, upon the facts, the defendants did not do here. The defendants had no interest in the premises at Milk Street, and the business carried on there was the business of McCallum and of no one else. But even if the defendants did carry on business there, still the rules in question do not apply to them, for they were foreigners domiciled and resident abroad. In *Russell* v. *Cambefort* (1) it was decided that a firm, the members of which were Frenchmen resident in France, though carrying on business in this country, could not be served under Order IX., r. 6, of the rules then in force, by service on the manager at the place of business within the jurisdiction. The present rule, Order XLVIII. A, r. 3, is a reproduction of Order IX., r. 6, with the addition of the words, "whether any of the members thereof are out of the jurisdiction or not," which addition was intended merely to meet the difficulty that arose in the case of *Indigo Co.* v. *Ogilvy* (2), where it was held that even in the case of an English firm, if some of the partners were temporarily abroad, service upon the partners who were in England was not a good service on the firm. The decision in *Russell* v. *Cambefort* (1) therefore governs the construction to be put upon the new rule, for a Scotchman is as much a foreigner as a Frenchman; indeed, Fry, L.J., in that case, at p. 530, expressly treated French firms and Scotch firms as standing on the same footing.

Rule 1 of Order XLVIII. A, is a repetition of Order XVI., r. 14, of the rules of 1883, with the addition of the words, "and carrying on business within the jurisdiction." That was a rule relating merely to the mode of framing the writ in an action against a partnership, and had nothing to do with the question of jurisdiction, and the insertion of the new words cannot be regarded as altering the character and object of the rule.

Asquith, *Q.C.*, and *Kenelm Digby*, for the plaintiff. The service was good. The defendants carried on business within

(1) 23 Q. B. D. 526. (2) [1891] 2 Ch. 31.

the jurisdiction within the meaning of rule 1. In *Werle & Co.* v. *Colquhoun* (1), a firm of French wine merchants resident in France, who employed agents in this country upon commission to obtain and remit to them orders for their wine, were held to exercise a trade within the United Kingdom, and to be consequently liable to income tax upon the profits of the orders obtained by the English agents. The facts of the two cases are identical, and no distinction can be drawn between exercising a trade and carrying on a business. But if the defendants carried on business within the jurisdiction they are none the less liable to be sued here and served under rule 3 because they happen to be Scotchmen resident in Scotland. In *Western National Bank* v. *Perez, Triana & Co.* (2), where the case of *Russell* v. *Cambefort* (3) was followed, Lord Esher, M.R., dissented and expressed a strong opinion, in which Bowen, L.J., concurred, that the rules on this subject required redrafting. They were accordingly shortly afterwards redrafted in their present form, and it was obviously with the intention of overruling *Russell* v. *Cambefort* (3) that the words, "whether any of the members thereof are out of the jurisdiction or not," were inserted in rule 3. But even if *Russell* v. *Cambefort* (3) is not to be treated as overruled, it is distinguishable from the present case, for the partners there were Frenchmen, and not subject to the Imperial Parliament, whereas Scotchmen are.

Robson, in reply. The words, "carrying on business within the jurisdiction" in rule 1 must be read along with and as limited by rule 3, which speaks of "the principal place within the jurisdiction of the business of the partnership." It may well be that persons may carry on a business within the jurisdiction so as to render them liable to income tax, and yet not carry it on at a place of business within the jurisdiction at which they can be effectually served.

LORD COLERIDGE, C.J. In this case we are called upon to decide for the first time what is the true construction to be placed upon the new rules of the Supreme Court of June, 1891.

(1) 20 Q. B. D. 753. (2) [1891] 1 Q. B. 304.
(3) 23 Q. B. D. 526.

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So far as appears upon the surface of those rules, they do not deal with the question of service upon foreigners, they were apparently drawn alio intuitu; and although that question may be to some extent affected by them, it was not one of the questions which it was the primary object of these rules to settle. It must, however, be assumed that the judges who drafted the rules did so with reference to the state of the authorities existing at the time, and that they did so with the decision in *Russell* v. *Cambefort* (1) distinctly present to their minds. I think it must be taken that it was intended in these rules to accept the decision in *Russell* v. *Cambefort* (1), a decision which rested upon certain broad principles of international comity, which in questions of jurisdiction must always be assumed to underlie the rules of Court or the enactments of Parliament itself; for although no doubt Parliament, or the judges framing rules of Court under the authority of Parliament, might, if they chose, give the Courts of this country jurisdiction over foreigners, it must always be assumed, in the absence of express words to that effect, that they did not intend to do so. I am of opinion that these rules must be read by the light of the principles laid down in *Russell* v. *Cambefort*. (1) The case before us, however, may be decided upon another ground. Under rule 3 of Order XLVIII. A, it is only "where persons are sued as partners in the name of their firm under rule 1" that the writ may be served in the manner therein provided, and under rule 1 it is only partners "carrying on business within the jurisdiction" that may be sued in the name of their firm. Therefore, the question whether the service in this case upon McCallum was a good service on the defendants depends upon this, Did the defendants carry on business within the jurisdiction? And that is a question of fact. Now the facts are these. The defendants are Scotchmen residing in Glasgow, where they carry on business as woollen manufacturers, and they have an agent in London for the sale of their goods of the name of McCallum. His agency seems to be of a limited description. He does not sell; he has no warehouse in which he can store the goods; he does not himself make contracts; all he does is to receive orders, which

(1) 23 Q. B. D. 526.

he transmits to the defendants in Glasgow for instructions; and in the majority of cases, upon the transmission of such orders, the further negotiation of the contracts is conducted directly between the London customers and the defendants themselves in Glasgow. The agent has a place in London in which he has two rooms—a small office and a sample room. He pays the rent, and they are his own rooms; and there he receives the orders which he deals with in the manner described. Is then that a carrying on of business by Messrs. Anderson in London? I think not. It would to my mind be doing violence to language to say that it was. The business so carried on there was the business of McCallum, not of the defendants. But, if so, the condition of the first rule is not satisfied, and the defendants cannot be sued by a writ served upon McCallum as their agent. The appeal must be allowed.

WRIGHT, J. I am of the same opinion. When one considers that, so far as the question of jurisdiction is concerned, there can be no substantial distinction between suing an individual and suing a firm, the matter becomes reasonably plain. Suppose an individual foreigner, resident in his own country, had a place of business here, he could not be effectually sued here except by means of serving him out of the jurisdiction. In every case in which there is any real reason for allowing a foreigner to be sued in this country, leave so to serve him can be given under the existing rules; or, if there is any omission, Parliament, or possibly the Rule Committee, can remedy the defect. But in cases outside the provisions of the rules of Court relating to service out of the jurisdiction, an individual foreigner cannot be sued here, even though he had his office and place of business here. But, if so, why should two foreigners be capable of being served here as a firm, when they could not be served here separately? I can see no reason for it. The case of *Russell* v. *Cambefort* (1) really dealt with a question of principle and not with a matter of technicality; and the mere fact of the defendants being partners is not sufficient to justify proceedings being taken against them here in cases in which proceedings could

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not have been taken against one of them here if he were the sole defendant. The rules relating to the service of partners deal with a question of machinery and nothing more; and the case of *Russell* v. *Cambefort* (1) decided—if I may be permitted to say so—rightly that a mere rule of special procedure dealing with the technical difficulties relating to the service of partners ought not to be held to enlarge the jurisdiction of the Courts. Rule 1 of Order XLVIII. A. deals merely with the form of the writ. It simply says that when you are suing a number of co-partners jointly, instead of naming them all in the writ you may sue them in the name of their firm. The rule contains no such words as one would have expected if there had been any intention of overruling *Russell* v. *Cambefort*. (1) Had it been intended to enlarge the jurisdiction, one would have expected, having regard to the knowledge of the judges who framed this rule of the state of the law at the time they framed it, that it would have contained the words "whether foreigners or not," or some words of that kind. It is a general principle of law that all legislation on a given subject is presumed to have taken place with knowledge of, and with reference to, the state of the law at the time it took place. If one is to consider that the judges who framed this rule sat down to frame it with the case of *Russell* v. *Cambefort* (1) before them, it is inconceivable that they should have framed it as they did, if the doctrine of that case, a doctrine laid down, not as a mere technical interpretation of a rule, but as a reasoned statement of the principles upon which legislation is to proceed, was intended to be overruled. Then rule 3 deals with the manner in which the writ may be served in cases in which partners are sued in the name of their firm under rule 1. But if rule 1 does not apply to foreign partners resident abroad, neither can rule 3 have any application to a partnership of that description. The words in rule 3, "Whether any of the members thereof are out of the jurisdiction or not," were merely intended to meet the difficulty that arose in *Indigo Co.* v. *Ogilvy*. (2)

The only other question to be decided is whether, assuming that we are wrong upon the first point, the office in Milk Street

(1) 23 Q. B. D. 526. (2) [1891] 2 Ch. 31.

was the place of business of the defendants within the meaning of rule 3, and I agree with my Lord that it was not, even though the defendants may in one sense be said to have carried on business there. There may be many places in which a person or firm may be said to carry on business or exercise a trade, for the purposes of income tax or otherwise, and yet which it would be an abuse of language to say were the place of business of that person or firm.

Writ and service set aside.

J. F. C.

Dec. 1. The plaintiff appealed.

Asquith, Q.C., and *Kenelm Digby*, for the plaintiff, contended upon the facts that the defendants carried on business and had a place of business within the jurisdiction, and therefore the writ and service were good.

Robson, for the defendants, was not called upon. (1)

LORD ESHER, M.R. In this case the judges in the Divisional Court have decided that the writ was improperly issued, and also that it was improperly served, and therefore that both the writ and the service must be set aside. The Lord Chief Justice held that the defendants did not carry on business in England, and, if so, of course it followed that they had no place of business in England. If both these propositions are true, then both the writ and the service are bad. If one is true and not the other—if, though they carried on business in England, they had no place of business in England, then the service of the writ would be bad. Wright, J., held that the defendants had no place of business in England; but he also held that, even if they did carry on business and had a place of business in England, as they are Scotchmen and not within the jurisdiction, they are in the same position as foreigners, and these rules, which are mere rules of procedure, do not apply to them, and on that ground also both the writ and the service were bad. Two of the questions

(1) The Court being against the plaintiff on the first point, the second point, viz., whether, assuming that the defendants did carry on business at a place of business within the jurisdiction, the writ and service were good, was not argued.

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thus raised are questions of fact. The facts of the case are these. The defendants, who are Scotchmen, and who reside in Scotland and not in England, are manufacturers of flannels in Glasgow. The whole of their manufacturing appears to be done in Scotland. They are also of course sellers of the flannel which they manufacture. They employ a man named McCallum to obtain orders for them in London. For what he does, he is paid by them a commission, not on the orders obtained, but on the business done. If he gets an order which they accept, he gets a commission; but if they do not accept it, he gets no commission. When he gets an order, he has no power himself to accept it; all he has to do is to send it on to Scotland, that the defendants may say whether they will accept it or not; and in most cases, if they do accept it, they deal directly with the person giving the order. Again, the agent does not appear to deliver the goods, if the order is accepted. The goods are not always to be delivered in London. In the present case, the delivery of the goods was not in London, and McCallum had nothing to do with the matter except as regards sending on the order. His business is to obtain orders which are in law and in fact mere proposals. The defendants then consider whether they will accept them. If they do, they make a contract with the principal. McCallum, no doubt, has a good deal to do in this way for the defendants. He does not, in fact, obtain orders for other people, and it may very well be that by the terms of the arrangement he cannot and ought not to do so—at any rate for other flannel manufacturers. The amount of the commission he earns I dare say makes it worth his while to act only for the defendants. He cannot get orders without shewing samples; he therefore has taken two rooms in Milk Street, one of which he uses as an office, and the other as a small room in which he keeps the samples. The samples are the only things which are kept there. He pays the rent in respect of the rooms. It does not appear that it is essential that he should have an office at all. For aught we know he may keep the samples at his residence, or he may take an office where he pleases. What is the inference to be drawn from these facts? I agree with the view taken by the Divisional Court that this office is not the office of the defendants,

but of McCallum only. Consequently the defendants have no place of business in London, and it follows that the writ could not be served at this office, and therefore the service is bad and must be set aside. Then, do the defendants carry on business in London? The only thing done for them in London is this obtaining of orders by McCallum. Is that carrying on business in London? It is doing an act which goes towards carrying on business. But we must deal with the expression "carry on business" as used in the rules in the ordinary business sense. One might as well say that the defendants carry on business in any place through which their goods pass while being sent to their customers. The same considerations, which shew that the office is not their office, go to shew that they do not carry on business in London. Therefore the writ was improperly issued, and must be set aside, as well as the service. That being so, it is not necessary, and I think it better not to express any opinion on this occasion on the question whether the decision in *Russell* v. *Cambefort* (1) still applies under the new rules.

Lord Esher, M.R.

KAY, L.J. This writ was issued without leave in the name of the plaintiff against a foreign firm, none of the members of which reside or have been served in England. The service was not on the members of the firm or any of them, but on a person named McCallum in London. By Order II., r. 4, a writ cannot be issued for service out of the jurisdiction without leave; but it is sought to say that the case comes within Order XLVIII. A., rr. 1, 3, and therefore the writ was rightly issued and served under those rules. Rule 1 provides that "any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action." I agree with the Master of the Rolls that this firm did not carry on business within the jurisdiction. Therefore they could not be sued in the name of their firm and the point does not arise whether, if they had done so, the case of a foreign firm is within the rule. The service was made under Order XLVIII. A., r. 3, which provides that "where

(1) 23 Q. B. D. 526.

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persons are sued as partners in the name of their firm under rule 1, the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the partnership upon any person having at the time of service the control or management of the partnership business there." If the defendants did not carry on business within the jurisdiction, clearly they could have no place of business within the jurisdiction. I am of opinion for the reasons given by the Master of the Rolls that the office in Milk Street was not the place of business of the defendants, and that McCallum was not a person having control or management of the partnership business there. For these reasons it seems to me that both the writ and the service were bad, and therefore that they ought to be set aside.

Appeal dismissed.

Solicitors for plaintiffs: *Phelps, Sidgwick & Biddle.*
Solicitors for defendants: *Ingledew, Ince & Colt.*

E. L.

C. A.

Nov. 24.

[IN THE COURT OF APPEAL.]

PELTON BROTHERS *v.* HARRISON [2].

Practice—Costs—Married Woman—Judgment against—Costs payable out of Separate Property—Costs due to Married Woman—Right to set off Costs—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2—*Order* LXV., *r.* 27, *sub-r.* 21.

A married woman, who was possessed of separate property, incurred a pecuniary liability to the plaintiffs. After the death of her husband she was sued in respect thereof, and judgment was recovered against her with costs, execution being limited to her separate property not subject to a restraint on anticipation. Subsequently the plaintiffs obtained an order for the appointment of a receiver of certain property which, during the coverture, had been separate property subject to a restraint on anticipation. This order was set aside with costs. On taxation of these costs the plaintiffs claimed to set off against them the costs recovered in the action:—

Held, that, although execution as to the costs recovered in the action was limited to the separate property of the defendant, these costs could be set off against costs payable to her personally on the discharge of the order for a receiver.

APPLICATION to vary the certificate of the taxing master under the following circumstances.

A married woman, who was possessed of separate property, incurred a pecuniary liability. After the death of her husband she was sued in respect of this liability, and judgment for the amount claimed and costs was recovered against her in the form settled in *Scott* v. *Morley* (1), execution to be limited to her separate property not subject to any restraint on anticipation. The plaintiffs, having failed to realize their judgment out of the separate property as to which during the coverture there had been no restraint on anticipation, obtained ex parte an order for the appointment of a receiver of the defendant's property as to which during the coverture she had been restrained from anticipation. The Court of Appeal, affirming the decision of the judge in chambers and the Divisional Court, upon the application of the defendant, discharged this order with costs. (2)

Upon taxation of these costs the master, under Order LXV., r. 27, sub-r. 21, set off against them the costs payable under the judgment by the defendant out of her separate property and gave his certificate accordingly.

On the hearing of the first appeal any question of costs that might arise was reserved, and application was accordingly made to the Court of Appeal to vary the certificate of the master.

Butcher, for the defendant. This case does not come within Order LXV., r. 27, sub-r. 21. That rule contemplates a personal liability to pay costs, and allows a set-off in such a case as that. The master has set off the costs payable under the judgment out of the defendant's separate estate against the costs payable to her personally. The defendant is not personally liable under the judgment. Before the Married Women's Property Act, 1882, a married woman was not personally liable upon contracts made by her during coverture. The only remedy was in equity against her separate estate: *Atwood* v. *Chichester* (3); Seton on Decrees, 4th ed. vol. ii. 687. She could not be made a bankrupt: *Ex parte Jones, In re Grissell.* (4) The Married Women's Property Act, 1882, has not altered the law so as to render her personally

(1) 20 Q. B. D. 120, at p. 132.
(2) See *Pelton Brothers* v. *Harrison*, [1891] 2 Q. B. 422.
(3) 3 Q. B. D. 722.
(4) 12 Ch. D. 484.

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liable on her contracts. The Act has only given more extensive remedies against her separate estate. Under s. 1, sub-s. 2, she cannot contract so as to bind her separate property unless she has some separate property at the date of the contract: *Palliser* v. *Gurney* (1); *Stogdon* v. *Lee.* (2) As stated by Bowen, L.J., in *Scott* v. *Morley* (3), the words of s. 1, sub-s. 2, do not create any personal liability; they only subject the married woman to a "proprietary liability." She cannot be made a bankrupt, unless she carries on a trade separately from her husband: *In re Gardiner, Ex parte Coulson.* (4)

In *Holtby* v. *Hodgson* (5), the decision turned upon Order XLV., r. 1, which does not touch the present case. No doubt the judges in that case used language to the effect that a judgment against a married woman is a judgment against her personally, but those observations were only dicta, not necessary for the decision, and are contrary to the previous cases. The plaintiffs here are endeavouring by means of this set-off to obtain payment of their costs out of that which is not separate property at all. The judgment expressly directed payment out of the separate property only, and the costs payable by the plaintiffs to the defendant do not form part of her separate property, as the coverture is now at an end.

[*Johnson* v. *Gallagher* (6); *Batten* v. *Wedgwood Coal and Iron Co.* (7), were also referred to.]

Horne Payne, Q.C., for the plaintiffs, was not called upon.

LOPES, L.J. In my opinion this case comes within Order LXV., r. 27, sub-r. 21, and I am satisfied with saying that I entirely adhere to what was said by this Court in *Holtby* v. *Hodgson.* (5) I there said that a judgment against a married woman, though only enforceable against her separate estate not subject to a restraint upon anticipation, is precisely the same as a judgment against an unmarried woman, except that in the case of a married woman there is no remedy upon the judgment against her personally such as by committal to prison, and that the judgment

(1) 19 Q. B. D. 519.
(2) [1891] 1 Q. B. 661.
(3) 20 Q. B. D. 120, at p. 128.
(4) 20 Q. B. D. 249.
(5) 24 Q. B. D. 103.
(6) 3 De G. F. & J. 494.
(7) 28 Ch. D. 317.

cannot be made the foundation of bankruptcy proceedings unless she trades separately from her husband. If that is so, the decision in *Holtby* v. *Hodgson* (1) determines this case, and the point made on behalf of the defendant cannot be maintained.

KAY, L.J. I am of the same opinion. It seems to me impossible after the decision in *Holtby* v. *Hodgson* (1) to say that in no case is a married woman personally liable when a judgment is recovered against her. The foundation of that decision was that she is personally liable and that the judgment is against her, and the fact that execution is limited to her separate property not subject to any restraint on anticipation does not make it any the less a judgment against her. That was not merely a dictum; it was the foundation of the decision. The argument there was that the plaintiff could not attach a debt due to her because he had no judgment against her personally. The answer to that was that the judgment which the plaintiff had recovered was a judgment against her personally, and, therefore, the debt could be attached. Although she could not be made a bankrupt, nevertheless it was a judgment against her. So here there is a judgment against a married woman, although execution could only issue upon it against her separate property. The taxing master, therefore, had jurisdiction under Order LXV., r. 27, sub-r. 21, to set off the costs as he has done, and this application to vary the certificate must be dismissed.

Application dismissed.

Solicitor for plaintiffs: *W. T. Child, for J. S. Streeter, Croydon.*
Solicitors for defendant: *Mear & Fowler.*

(1) 24 Q. B. D. 103.

A. M.

C. A.
1891
Nov. 20.

[IN THE COURT OF APPEAL.]

FLETCHER *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Practice—Non-suit—Power of Judge to non-suit Plaintiff against his will—Non-suit without hearing Evidence—New Trial.

A judge at the trial of an action cannot, after the case has been opened, non-suit the plaintiff without his consent and without hearing the evidence tendered by him.

MOTION by the plaintiff for a new trial.

The action was for damages for personal injuries alleged to have been caused through the negligence of the defendants' servants.

At the trial, Wright, J., after hearing the opening of the plaintiff's counsel, stating the case which he expected to prove, non-suited the plaintiff without the consent of his counsel, and in spite of his insisting that he ought to be allowed to call his witnesses.

Kennedy, Q.C., and Hon. *J. W. Mansfield*, for the plaintiff.
Ambrose, Q.C., and *L. Sanderson*, for the defendants.

LORD ESHER, M.R. I am of opinion that the learned judge struck too soon. I will state the proposition in its broadest form. In my opinion a judge has no right, without the consent of the plaintiff's counsel, to non-suit the plaintiff upon his counsel's opening statement of the facts. The opening of counsel may be incorrect in consequence of his having had wrong instructions. Owing to some accident, even with the greatest care, the evidence of the witnesses when they are called may differ from that which has been opened by counsel. It is for that very reason that a right of reply is given to the plaintiff's counsel, and in recent times a right to sum up the evidence has been given to the plaintiff's counsel, and the defendant's respectively, after his witnesses have been called. The experience of judges and of practitioners shews that the evidence often turns out to be somewhat different from that which appears in the instructions given to counsel. Therefore I state this proposition in its full

extent—a judge has no right to non-suit a plaintiff upon his counsel's opening without the consent of the counsel. That is what the learned judge has done in the present case. There was no assent on the part of the plaintiff's counsel. On the contrary, the plaintiff's counsel insisted upon his right to have the plaintiff's witnesses called, but, notwithstanding this, the learned judge persisted in non-suiting the plaintiff on his counsel's opening. I think he was wrong in so doing, and the case must go down for trial.

LOPES, L.J. I am of the same opinion. I abstain from expressing any opinion whether there is evidence of negligence to go to the jury. I come to the conclusion that the case ought to go down for trial again solely on this ground, that the learned judge, without the consent of the plaintiff's counsel, non-suited the plaintiff upon his counsel's opening, and I say unhesitatingly that I do not think any judge has the power to non-suit a plaintiff upon the opening of his counsel without that counsel's consent, and when he desires to call his witnesses. No such consent was given in the present case, and the learned counsel wished to call his witnesses. It is hardly necessary to point out how dangerous it may be to non-suit a plaintiff upon the mere opening of his counsel. It very frequently does and must happen that counsel's brief does not disclose all the facts accurately, and in such a case counsel would open the case according to his brief when there were really other facts not disclosed in the brief which might have been proved, if the evidence had been properly given. Again, it very frequently happens that though the evidence, so far as the plaintiff's solicitor knows it, is fully set out in the proofs, yet when the witnesses come into the box they give other evidence (quite truthfully) which very much alters the case in the plaintiff's favour. Moreover, when the plaintiff, in such a case as the present, comes to be cross-examined, evidence may be elicited which has not occurred to any one before—evidence generally, no doubt, highly detrimental to the plaintiff, but sometimes very favourable to him. I think, therefore, that the case ought to go down again for trial.

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KAY, L.J. I will not venture to say a word about any technicalities of practice which arise in this case. That which leads me to concur in the judgment of the other members of the Court is this—I am simply startled at the notion that a suitor may lose his cause because his counsel in his opening happens by some accident to have omitted to state, or to have mis-stated, some fact which, if proved, and the case had gone to the jury, might have so influenced them as to induce them to decide in the suitor's favour. That this should be part of the practice of English courts of justice would be to me a very surprising thing indeed. I agree that the case ought to be tried.

LORD ESHER, M.R. The application in this Court must be allowed with costs. The costs of the trial will abide the result of the next trial.

Order for new trial accordingly.

Solicitors: *Field, Roscoe & Co.; C. H. Mason.*

W. L. C.

Oct. 29.

HEBBLETHWAITE AND ANOTHER *v.* PEEVER.

Limitations, Statute of—"Judgment"—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

By s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57): "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same," &c.:—

Held, by Collins, J., that the expression "judgment" in the section refers to judgments generally, and is not restricted to judgments which operate as charges upon land.

ISSUE stated by a master between the plaintiffs, the executors of James Hebblethwaite, and the defendant, one of the executors of Charles Peever, raising the question whether or not a judgment obtained by the plaintiffs' testator against the defendant's testator in October, 1871, for 42*l.* 15*s.* and 4*l.* for costs, was barred by s. 8 of the Real Property Limitation Act, 1874. No land had been taken in execution under the judgment.

T. Willes Chitty and *Ernest Pollock*, for the plaintiffs, referred to *Watson* v. *Birch* (1); *In re Tynte, Ex parte Tynte* (2); *Sutton* v. *Sutton* (3); *Fearnside* v. *Flint*. (4)

Barnard Lailey, for the defendant.

COLLINS, J. The question raised is whether the judgment recovered in October, 1871, is barred by statute. This depends upon the effect of s. 8 of the Real Property Limitation Act, 1874.

This is a proceeding brought to recover a sum of money secured by a judgment, and it is said on behalf of the defendant in the issue that all such proceedings are barred after the lapse of twelve years by this section. On the other hand, it is contended for the plaintiffs in the issue that the title and recitals of both this Act and the earlier Act (3 & 4 Wm. 4, c. 27), shew them to be Acts passed for the purpose of relieving lands from certain liabilities, that the word "judgment" relied on for the defence occurs in a category of securities, all of which are charges upon land, and that the section only applies to judgments if and so far as they operate as charges upon land. The words of the section in each Act (s. 8 of the Act of 1874, and s. 40 of 3 & 4 Wm. 4, c. 27) are: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land."

By the Act 27 & 28 Vict. c. 112, s. 1, it is provided that "no judgment, statute, or recognizance to be entered up shall affect any land of whatever tenure until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment, statute, or recognizance." It was contended by the learned counsel for the plaintiffs that as by reason of this section the judgment in question, which was not followed up by execution on land, did not become a charge upon the judgment debtor's lands, it is not a judgment to which the 8th section of the Act of 1874 has any application. This argument, however, loses its force unless the

(1) 15 Sim. 523.
(2) 15 Ch. D. 125, at p. 128.
(3) 22 Ch. D. 511.
(4) 22 Ch. D. 579.

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Collins, J.

effect of judgments in operating as a charge upon the debtor's lands, which was taken away by the Act 27 & 28 Vict. c. 112, existed at the passing of the earlier Statutes of Limitation (3 & 4 Wm. 4, c. 27), the 40th section of which was repealed by the Real Property Limitation Act, 1874, and re-enacted by s. 8 of the latter with the substitution of twelve years for twenty.

Now, judgments were made charges upon the judgment debtors' land by the Act 1 & 2 Vict. c. 110, s. 13; so that the earlier Statute of Limitations (3 & 4 Wm. 4, c. 27, s. 40) was clearly not restricted to such judgments as were charges upon land. Sect. 8 of the Act of 1874, which is relied upon by the defendant in the issue, exactly follows the wording of s. 40 of the Act of 1833, and the same construction is applicable to both sections.

It was further argued that s. 8 of the Act of 1874 covers not only judgments charged upon but judgments payable out of land, and that a judgment, though no longer a charge upon land, is yet payable out of any land to which the judgment debtor may be entitled. It is, however, not necessary for me to say how this may be, for it is clear, for the reasons which I have indicated, that the Act of 1833 and the Act of 1874 apply to judgments generally. There will, therefore, be judgment for the defendant in the issue.

Judgment for the defendant.

Solicitors for plaintiffs: *Sweetland & Greenhill.*
Solicitors for defendant: *Haynes & Claremont.*

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.
1891
Nov. 26.

LAW *v.* LOCAL BOARD OF REDDITCH.

Damages—Penalty—Liquidated Damages—Sum payable on one Event only—Non-completion of Works by Day Specified.

By a contract for the construction of sewerage works, it was provided that the works should be completed in all respects by a specified date; and, in default of such completion, the contractor should forfeit and pay the sum of 100*l.* and 5*l.* for every seven days during which the works should be incomplete after the said date as and for liquidated damages:—

Held, that, inasmuch as the sums agreed to be paid as liquidated damages were payable on a single event only, viz., non-completion of the works, they were to be regarded as liquidated damages, not as penalties.

APPEAL from the judgment of Hawkins, J., at the trial without a jury.

The facts were as follows. The plaintiff sued for the price of work done by him under a contract with the defendants for the construction of certain sewerage works. The defendants paid money into Court and counter-claimed 160*l.* as being due to them by way of liquidated damages for delay in completion of the works under the contract. By the contract the plaintiff contracted, that in consideration of the sum of 630*l.*, to be paid as thereinafter stated, he would, in a good, substantial, and workmanlike manner, and with materials sufficient and proper of their several kinds, execute, perform, and complete all and singular the works and things mentioned, or described in, or implied by, or reasonably to be inferred from, the contract and specification thereunto annexed, and thereinafter called "the works," according to the said specification and plans. There were in the contract and specification a number of stipulations with regard to the conduct of the works by the contractor which it is unnecessary to set out, and it was provided that "the works shall be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish, on or before April 30, 1889, to the satisfaction of the said surveyor, to be testified by a certificate under his hand, and, in default of such completion, the contractor shall forfeit and pay to the urban authority the sum of 100*l.* and

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5*l.* for every seven days during which the works shall be incomplete after the said time, and the sums so forfeited may be recovered by the urban authority from the contractor as and for liquidated damages." There was also a clause providing that in default of the due performance and execution of the terms of the contract by the contractor, he should pay to the urban authority the sum of 200*l.* as and for liquidated damages for the breach of the contract, in addition to any other penalties, forfeitures, and damages to which he might be liable under the contract. The works were not completed until after April 30, 1889, and the defendants claimed to be entitled to the sum of 100*l.* and 5*l.* per week for twelve weeks, as being the period during which they remained incomplete after that date.

The case ultimately turned wholly on the question whether the sums of 100*l.* and 5*l.* per week mentioned in the contract were penalties or liquidated damages, the parties agreeing at the trial that, if the sum of 160*l.* was entirely penalties, the judgment should be for the plaintiff for 75*l.*; if the sum of 100*l.* was penalty, but the sum of 60*l.* was liquidated damages, then the judgment should be for the plaintiff for 40*l.*; and if the sum of 160*l.* or 100*l.* was liquidated damages, then the judgment should be for the defendants. The learned judge was of opinion that the 100*l.* and 5*l.* per week mentioned in the contract were liquidated damages and not penalties, and therefore gave judgment for the defendants.

Jelf, Q.C., and *C. F. Vachell*, for the plaintiff. The plaintiff is entitled to judgment. The sums of 100*l.* and 5*l.* per week mentioned in the contract are penalties, not liquidated damages; at any rate, the sum of 100*l.* is a penalty. When a sum is made payable by a contract in respect of non-performance of any of several matters of varying importance, some being very trivial, it is to be regarded as a penalty, not as liquidated damages: *Sloman* v. *Walter* (1); *Kemble* v. *Farren*. (2) Here there are two events on which the money is to become payable. The works are to be completed, and they are to be cleared of implements, rubbish, &c., by April 30, 1889, to the satisfaction of the

(1) 2 W. & T. 6th ed. p. 1257. (2) 6 Bing. 141.

surveyor, and both these matters are to be certified by the surveyor. Then, in default of "such completion," which includes the clearance by the time specified, the penalty is to be payable. Therefore, if a single wheelbarrow were left about the works for a day after April 30, the 100*l.* would become payable. Assuming the construction of the contract to be otherwise, and that "completion" refers to the completion of the works apart from their clearance, the same principle applies.

"Non-completion" may be said to be an event of multitude. It covers a great many breaches of contract, some of which may be very important, others very minute. The works may be incomplete on the specified day to the extent of a small portion of brickwork, which the urban authority could easily get laid by any builder in a few hours. There is no proportion between a lump sum of 100*l.*, which would become payable if the work were incomplete to a very small extent a day after the time specified, and the various degrees of incompleteness which may exist, and the damage occasioned by them respectively. It is not like a sum calculated at so much a week or an acre, or in some such way so as to bear a proportionate relation to the amount of damage. The effect of treating these as liquidated damages would be that the amount of damages would not vary proportionately with the period of delay. On a day's delay in completion 100*l.* would become payable; but six days more of delay would only raise the amount to 105*l.*; and ten weeks' delay would only make it half as much again as 100*l.*, the sum payable for one day's delay. Under these circumstances, is it not obvious that the 100*l.* was really intended as a penalty? It is clear from the authorities that the fact that the parties have called the sum "liquidated damages" is immaterial. [They also cited *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1); *In re Newman* (2); *Wallis* v. *Smith* (3); 8 & 9 Wm. 3, c. 11, s. 8.]

Hugo Young and *R. Harington*, for the defendants, were not called upon.

LORD ESHER, M.R. In this case it does not seem to me to be necessary to go through all the cases that have been decided on

(1) 11 App. Cas. 332. (2) 4 Ch. D. 724. (3) 21 Ch. D. 243.

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the subject. One rule which appears to be recognised in the cases as a canon of construction with regard to agreements of this kind is that, where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the Court as liquidated damages and not a penalty. One recognised exception to such rule is where a sum of money is to be payable upon the non-payment of a smaller specified sum, in which case the Courts have treated the larger sum as a penalty, not as liquidated damages; and I should think that another exception would be where the sum agreed to be paid is, with regard to the matter in respect of which it is agreed to be paid, so large as to make the idea that it was intended to be payable by way of liquidated damages so absurd that the Court would be compelled to arrive at the conclusion that it was to be paid, not as liquidated damages, but as a penalty. There are other cases in which the parties to a contract have agreed that the one is to pay and the other to be paid a sum of money in respect of the doing or failure to do any of a number of different things of very different degrees of importance. It has been laid down in cases of this kind, as a general rule at any rate, that such sum of money is to be regarded as a penalty, not as liquidated damages. But with regard to this class of cases there are many questions of difficulty which may arise and may have to be considered hereafter, but with which we need not, as it seems to me, trouble ourselves in this case. If these sums of 100*l.* and 5*l.* a week are to be paid in respect of the failure by the contractor to do one single thing, and, if there is only one event in respect of which they are to be paid, then the case comes within the general rule of construction which has been recognised in all the cases from the time of the judgment of Heath, J., in *Astley* v. *Weldon* (1), down to what Lord Herschell said in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (2) in the House of Lords, and those sums must, therefore, be treated as liquidated damages. We have to construe this contract by the light of that rule of construction. If, on the true construction of this contract, there is only one event

(1) 2 B. & P. 346.

(2) 11 App. Cas. 332.

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in respect of which the sums of money specified are to be paid, then they are to be regarded as liquidated damages and not as penalties. The contract is for the construction of drainage works, and the material portion of it is as follows: "The works (i.e., the drainage works) shall be completed in all respects and cleared of all implements, tackle, impediments, and rubbish on or before April 30, 1889." Those are, as it seems to me, two distinct matters which have to be done by April 30. But then the contract goes on to say, that "in default of such completion the contractor shall forfeit and pay to the urban authority the sum of 100*l.* and 5*l.* for every seven days during which the works shall be incomplete after the said time." Two things are mentioned previously, completion of the works and clearing them of implements, &c. The default mentioned is of "such completion." Why is "completion" there to be construed in a different sense from that which it bore in the earlier part of the clause, where it was spoken of as distinct from the clearing of the works from implements, &c.? There seems to me to be only one event on which the liability to pay the sums mentioned depends, viz., non-completion of the works by the time specified. Then the contract goes on to say that the sums so forfeited may be recovered "as and for liquidated damages." I do not think much reliance ought to be placed on those words, for, even if the sums were called penalties, the same considerations might be applicable; but I do not think that they ought to be left out of account altogether. It seems to me that they go somewhat to shew that the parties intended that these sums should be liquidated damages and not penalties. If the true construction of the contract be what I have stated, viz., that the amount mentioned is to be paid in respect of the non-completion of the works by the specified time and not of the failure to clear them of implements, &c., then it seems to me that all ground for the suggestion that the event on which the sum is to be paid is "multitudinous" entirely disappears, and there is only one event upon which it becomes payable. But, assuming that the true construction of the contract is otherwise, I think then the same result follows. The works are to be completed and cleared, and both these matters are to be completed by April 30. In default of

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"such completion" the payment is to be made. So that in that case also there is only one event on which the payment is to be made. For these reasons, I think that, according to the well-recognised rule of construction, these were liquidated damages and not penalties, and therefore that the judgment of the learned judge was right, and this appeal should be dismissed.

LOPES, L.J. The question is whether the sums of 100*l.* and 5*l.* per week, mentioned in this contract, are penalties or liquidated damages. In the contract they are spoken of as "liquidated damages"; but too much reliance must not be placed on that, because it is clear that the use by the parties of the expression "penalty" or "liquidated damages" is not conclusive. The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages. There is a canon of construction which has been referred to by the Master of the Rolls, according to which, if the sum is payable on the happening or non-happening of one event, it is to be regarded as liquidated damages; but if, on the other hand, it is payable on the happening of several events, some of which would entail very trifling damage, then it is to be regarded as a penalty. For the purpose of applying that rule to the present case, it is necessary first to construe the contract. The material words are, "the works shall be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish, on or before April 30, 1889." I think that two events are here contemplated, one being the completion of the works, the other the removal of the tackle, &c. These are separate matters. Then the contract says, that "in default of such completion" the sums in question shall become payable. In my view those words do not refer to the clearance of the works, but to the completion of the works mentioned in the first part of the clause. According to the construction which I put upon the contract, only one event is

contemplated as that upon which the sums mentioned are to become payable, viz., the non-completion of the works by the specified day. That being so, it seems to me that those sums are liquidated damages. In support of this view, I would refer to what Lord Herschell said in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1) He said: "The agreement does not provide for payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled. There is nothing whatever to shew that the compensation is inordinate or extravagant in relation to the damage sustained, and provision is made that the payment is to bear interest from the date when the obligation is unfulfilled. I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as a penalty only; and I see no sound reason or principle, or even convenience, in so holding." The opinion so expressed seems to me to be entirely in accordance with what we are now holding with regard to the construction of this contract.

KAY, L.J. This contract contains a provision that a lump sum of 100*l.* and 5*l.* for every seven days during which the works remain incomplete after April 30, 1889, may be recovered "as and for liquidated damages." What the meaning of these words is, and why they were inserted in the contract, a short statement of the law on the subject may assist in shewing. In early times it was decided by Courts of Equity that, where a sum of money was agreed to be paid as a penalty for non-performance of a collateral contract, equity would not allow the whole sum to be recovered; but, where the damages for non-performance of such contract could be estimated, would cut down the penalty to the amount of the actual damages sustained. One of the earliest cases on the subject is *Peachy* v. *Duke of Somerset* (2), where Lord Macclesfield says, that "the true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money and the Court gives

(1) 11 App. Cas. 332. (2) 1 Str. 447.

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him all that he expected or desired." The doctrine so stated was afterwards modified and extended to other cases than the security of money by Lord Thurlow in *Sloman* v. *Walter* (1), where he says: "The rule that, where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken." In that case the sum to be paid was to secure to the defendant the use of a certain room, and Lord Thurlow, considering that it was in the nature of a penalty, and not of assessed damages, granted an injunction against a suit for the recovery of it. Therefore it became a settled rule in equity that, where a sum was agreed to be paid in respect of the performance or non-performance of a collateral matter, the actual damages for which could be estimated, the penalty would be cut down, and only the actual damages sustained would be allowed. It was for that very reason that the words "as and for liquidated damages," and similar words, came to be inserted in contracts. The contracting parties meant by the use of them to exclude this rule of equity, and to say that the sum agreed upon should be considered not to be a penalty, but the amount which they themselves assess as being the damages which would be incurred in the event of the contract being broken. It was to avoid the interference of Courts of Equity that such words were introduced. But then the Courts of Law interfered, and, as it seems to me, went further than Courts of Equity had done originally. They held that, though the parties had expressly said that the sum agreed to be paid was liquidated damages and not a penalty, they would construe the agreement as meaning that it should be a penalty. One of the leading cases at Common Law in which a sum agreed to be paid for breach of contract was treated as a penalty is *Astley* v. *Weldon* (2), where Heath, J., said: "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that, if a party do such a

(1) 1 Bro. C. C. 418.

(2) 2 B. & P. 346.

particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." Again, in *Kemble* v. *Farren* (1), though the contract expressly stated that the sum mentioned was to be paid as liquidated damages, the Court, seeing that it was to be paid on performance or non-performance of a number of matters, some of which would involve very inconsiderable damages, treated it merely as a penalty. If any one desires to read a very elaborate exposition of the cases on this subject, he will find it in the judgment of Jessel, M.R., in *Wallis* v. *Smith.* (2) It was no doubt a very serious interference with the terms of a contract to say that, though the parties had expressly stipulated that a sum was to be paid as liquidated damages, the Court would not allow the words to have their ordinary effect, but would treat the sum as a penalty. That has never been done, so far as I am aware, except in cases like *Kemble* v. *Farren* (1), where the damages were made payable, not on one single event, but on a number of events, some of which might result in very inconsiderable damages. In that case the Court applied a construction which was contrary to the very words which the parties themselves had used. We have to consider within which class of cases the present comes—whether this is a case where a sum is made payable upon several events, some of which are of small importance, or whether it is a case in which it is made payable upon only one event. I will not repeat what the Master of the Rolls has said for the purpose of shewing that upon the true construction of this contract the sums mentioned are made payable on one event only, viz., the non-completion of the works by the specified time. I agree that the other matter referred to, viz., the clearing away of the rubbish, &c., is not part of the matter the non-completion of which is the event upon which the money is to become payable. The words are, "The works shall be completed in all respects, and cleared," thus shewing that the clearance is something extra, beyond the completion in all respects. The money is to be payable on non-completion. But, even if the contract is to be read as meaning that the work shall be completed and that completion shall include clearance from implements, &c., I think that there is

(1) 6 Bing. 141. (2) 21 Ch. D. 243.

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only one event, viz., completion of the works, on which the liquidated damages are to become payable.

I cannot agree with the ingenious argument that, because there may be many matters, some very small, which would constitute non-completion, these sums may be regarded as payable on several events. According to that argument, there must be considered to be several different non-completions of the works. There may be different causes of non-completion; but non-completion is only one single event. For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Prior, Church, & Adams, for Roden & Dawes.*

Solicitors for defendants: *Fallows & Rider, for H. C. Browning.*

E. L.

C. A. 1891 *Dec.* 7.

[IN THE COURT OF APPEAL.]

IN THE MATTER OF AN ARBITRATION BETWEEN EYRE AND THE CORPORATION OF LEICESTER.

Practice—Arbitration—Submission to single Arbitrator—Refusal to concur in appointing Arbitrator—Notice to Appoint—Discretion—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 5.

The Arbitration Act, 1889, s. 5, enacts that "(*a*) where a submission provides that the reference shall be to a single arbitrator, and all parties do not, after differences have arisen, concur in the appointment of an arbitrator . . . . any party may serve the other parties . . . . with a written notice to appoint an arbitrator," and "if the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator."

A contract for the execution of works between a local authority and a contractor provided for the reference of differences that might arise to a single arbitrator. A difference having arisen, the contractor made proposals to the local authority with regard to the selection of an arbitrator, but they would not proceed with such selection. Thereupon the contractor served the authority with written notice "to concur in the appointment of a sole arbitrator in the matter":—

Held, that the notice given was a sufficient notice within the section.

As a general rule, where the conditions exist under which the section is applicable, the Court or judge has no discretion to refuse to appoint an arbitrator.

APPEAL from an order of a judge at chambers affirming the decision of a master refusing to appoint an arbitrator.

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The facts were as follows:—

By a contract made on October 17, 1888, between the Corporation of Leicester and F. Eyre for the construction of certain sewerage works by the latter, it was provided that the works specified and described in the specification should be executed to the entire satisfaction of Joseph Gordon of Leicester, surveyor and engineer (since deceased), the surveyor and engineer employed by the Corporation of Leicester for the purpose of the said works, or other the surveyor or engineer for the time being so employed, and that the contractor should in all respects submit to and perform the specification and every matter and thing therein contained, so far as the same should, in the opinion of the said Joseph Gordon or other the surveyor and engineer for the time being of the corporation, relate to or belong to the said works; and that the submission thereby made, and the award, order, or certificate which should at any time or from time to time be made by the said Joseph Gordon, or, in the event of his death or ceasing to be employed, by such surveyor or engineer of not less than ten years' standing as should be appointed in his place by the corporation, or "by other the arbitrator or umpire" to be appointed in accordance with clause 39 of the specification, as the case might be, either generally or specially for the purpose of the contract or for the works thereinbefore referred to, in reference to any dispute or difference which should or might arise between the parties thereto under the contract or the said specification or incidental thereto or arising thereout, or to the amount payable to the said contractor under or on account of the same, should be binding and conclusive on all parties, and might be made a rule of any of Her Majesty's Courts of Justice on the application of any of the parties thereto. By the 39th clause of the specification incorporated into such contract it was provided that every dispute, question, difference, or controversy arising between the borough surveyor and contractor (except as to certain matters not material to this case) should, after the completion and delivery of the works and after the final certificate by the borough surveyor, be referred to arbitration, pursuant to the provisions of the Common Law Procedure Act, 1854, or of any Act or Acts amending the same. The works had been

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completed by the contractor. Disputes and differences had arisen between him and the corporation, and between him and the said J. Gordon and the engineer appointed by the corporation upon his death for the purposes of the works, and the contractor was claiming from the corporation the sum of 7000*l.* for work done under the contract, and for damages for alleged breaches of contract by the corporation. The contractor's solicitors wrote to the town clerk on April 30, 1891, stating that their client was entitled, under clause 39 of the specification, to have the differences which had arisen submitted to arbitration, and an arbitrator appointed; that, the Arbitration Act, 1889, having been substituted for the arbitration clauses of the Common Law Procedure Act, if they could not agree as to the appointment of a sole arbitrator, it would be necessary that there should be an application to a judge to appoint one; that before making application to a judge they wished to inquire whether he thought it possible to agree upon an arbitrator; and that the corporation might either give them half-a-dozen names from which to select one, or they would give half-a-dozen names for the corporation to select from. To that the town clerk answered, stating that he was unable to assent to their views, or to acquiesce in the propositions which they made. Thereupon the contractor's solicitors served on the town clerk on July 16 a written notice addressed to the corporation and signed by the contractor, which was, so far as material, as follows: "In the matter of an arbitration between F. Eyre and the Mayor, &c., of Leicester, Take notice that you are hereby required to concur with me, the undersigned, in the appointment of a sole arbitrator to act in the above-mentioned matter for the purposes of the submission to arbitration made by certain articles of agreement dated, &c., pursuant to and in accordance with clause 39 of the specification in the said articles of agreement mentioned or referred to and therein incorporated." The said notice was accompanied by a letter from the contractor's solicitors to the town clerk stating that they understood that the corporation disputed the contractor's right to obtain the appointment of an arbitrator, and therefore were not prepared to take part in the selection of one; but that, if they were prepared to concur in an

appointment, they would be glad to submit names of competent engineers to them. The town clerk answered, saying that he failed to understand the meaning of the notice, as it was impossible to concur in the appointment of an arbitrator not named or suggested. The claims made by the contractor against the corporation included claims for extras under the contract amounting to a large sum, and claims for unliquidated damages, also to a large amount, in respect of alleged delay of the works occasioned by the refusal of the corporation to allow the work on the various sections of the sewers to proceed simultaneously and in respect of the insufficient capacity of the corporation's pumping engines and outfall sewer to carry away flood water in times of heavy rainfalls, by reason of which the contractor's site of operations was inundated. Seven days having elapsed since the service of the notice, and the corporation having taken no steps, application was made on behalf of the contractor to a master at chambers, under the Arbitration Act, 1889, for an order for the appointment of an arbitrator, but was refused. On appeal the judge at chambers affirmed the decision of the master.

1891. Nov. 16. *C. E. Jones*, for the appellant (the contractor).

Toller, for the respondent corporation, referred to *In re Smith & Service and Nelson & Sons.* (1)

LORD COLERIDGE, C.J. It is not suggested that this contract does not contain a "submission" within the meaning of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 5, by which "(*a*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator . . . any party may serve the other parties . . . with a written notice to appoint an arbitrator."

It is contended that the submission here does not provide that the reference shall be to a single arbitrator, because the words are "arbitrator or umpire," and no doubt there is a technical meaning which is often applied to the word "umpire" when it

(1) 25 Q. B. D. 545.

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is used to denote a person (often appointed by the arbitrators themselves) who is to settle any differences that may arise between two arbitrators; but that cannot always be the necessary meaning of the word, for where, as here, the word "arbitrator" is used in the singular, the word "umpire," in the sense to which I have referred, can have no application. I am, therefore, of opinion that in this contract the words "arbitrator" and "umpire" are used as synonymous terms, and, if that is so, the submission provides for a reference to a single arbitrator. There can be no doubt that in the present case differences have arisen, and I am of opinion that the parties "do not concur in the appointment of an arbitrator." It is contended that this expression refers to cases where an arbitrator named by one side is rejected by the other; but I think the more reasonable view is that it includes cases where one party objects to the appointment of any arbitrator, as, for instance, where there is a dispute as to whether the case comes within the arbitration clause at all. Here the corporation do not agree that any case for arbitration has arisen. Then a question has been raised as to the meaning of serving "written notice to appoint an arbitrator," and it is contended that we must look only at the formal notice of July 16, and that this is not such a notice as is contemplated. But I think that document must be read together with the letter with which it was inclosed, and that letter refers to concurring in the appointment of an arbitrator, and the corporation do not concur in the appointment of any one as arbitrator. It seems to me that the appellant has followed the words of the statute, for I interpret the words "concur in the appointment of an arbitrator" as equivalent to "concur in an arbitration." The necessary conditions precedent having been fulfilled, the case will be remitted to the master, who will have to decide whether there is to be an arbitration, and, if there is, who is to be the arbitrator.

WRIGHT, J., concurred.

Appeal allowed.

P. B. H.

The corporation appealed.

1891. Dec. 7. *Toller*, for the corporation. First, the submission here is not to a single arbitrator: see Arbitration Act, 1889, Sched. I. (*a*), (*b*). The use of the term "umpire" imports the contrary. Secondly, no sufficient notice within s. 5 of the Arbitration Act, 1889, has been given, and such notice is a condition precedent to the jurisdiction of the Court to appoint an arbitrator. The notice should be, according to the terms of the Act, to appoint, not to concur in appointing, an arbitrator; or, if not, it should name an arbitrator in whose appointment the corporation are to concur. Thirdly, assuming that the notice is sufficient and the section applies, the Court has a discretion. It is submitted that this is not a case in which the corporation should be compelled to go to arbitration. It must be admitted that some of the claims made by the contractor are within the submission; but it is contended that there are claims for unliquidated damages among them which are not matters within the submission. The object of the contractor is to get these matters referred to an engineer or other lay arbitrator. It has often been held in cases under the provision of the Common Law Procedure Act, 1854, for which s. 4 of the Arbitration Act is now substituted, where there was an application for a stay of proceedings in an action because there had been an agreement to refer, that the Court would not compel the plaintiff to go to arbitration when there were other matters in dispute besides those included in the submission, arising out of the same transaction, on the ground that there ought not to be double proceedings: see per Cotton, L.J., in *Turnock* v. *Sartoris*. (1) In such a case as this the contractor ought to be left to bring his action, and then all the matters in dispute could if necessary be referred together to an official referee.

C. E. Jones, for the contractor, was not called upon.

LORD ESHER, M.R. In this case I agree with the divisional Court that there was a submission to a single arbitrator. It seems to me that the only possible construction of the words is that the expression "arbitrator or umpire" is tautologous. It is not denied that the corporation refused to concur in the appointment

(1) 43 Ch. D. 150.

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of an arbitrator; but it is said that the contractor has not given the notice which by the 5th section of the Arbitration Act, 1889, is made a condition precedent to the right to apply to the Court for the appointment of an arbitrator. The section says that (among other cases) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator, any party may serve the other parties with a written notice to appoint an arbitrator, and, if the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on the application of the party who gave the notice, appoint an arbitrator. It is said that this notice is wrong, because it is not a notice to appoint, but only to concur in appointing, an arbitrator; but it seems to me that this objection is too fine; the result of that contention would be monstrous, because it involves that the party to whom the notice is given would have power to appoint the arbitrator by himself. In my opinion the word "appoint" in the section in such cases as this means "concur in appointing." Then it was argued that this notice was bad, because it did not name the arbitrator; but that contention seems to me to be against the words of the Act, which are "to appoint 'an' arbitrator." Then all the necessary proceedings having been taken, and a sufficient notice having been given and not complied with, what is the power and duty of the Court? In this case it is admitted, and the Court is satisfied that there is a dispute within the submission. Therefore the case stands thus: the parties have agreed with regard to certain matters to substitute arbitration by a single arbitrator for a trial in court; it is admitted that there is a dispute within the submission; the parties have failed to concur in the appointment of an arbitrator; and there has been a proper notice given which has not been complied with. What under these circumstances does the section provide that the Court is to do? It says that the Court "may" appoint an arbitrator. It is argued that under this provision the Court may say in this case, where it is admitted and the Court has decided that there is a dispute within the submission, that it will not force the corporation to go to arbitration, but will leave the

contractor to bring an action—that is, that the Court has a discretion to say in such a case that, though one side has contracted to refer the matter to arbitration, they need not act according to their contract, and that the Court will relieve them from it, and the other side must bring their action. I do not think that that is so. I think that in such a case as this "may" means "must," and that the Court is bound to appoint an arbitrator. I cannot accede to the argument that the Court has a discretion in such a case as this, because there is a discretion under s. 4 in cases where the parties have proceeded quite differently, and, one party having brought his action, the other party applies to the Court to stay it. That is the converse of this case. I give no opinion on the question what the power of the Court in such a case under s. 4 may be. The present case is not under that section. It appears to me that the decision of the Court below was right and should be affirmed, except so far as the direction to the master is concerned. I think that he ought not to have power to say whether there is to be an arbitration or not, but only to decide as to the choice of an arbitrator.

LOPES, L.J. I agree. With regard to the language of the section, I think that in a case like the present, where there is a dispute clearly within the submission and a failure to concur in the appointment of an arbitrator, and the proper notice has been given, the word "may" is equivalent to "must." I agree with the judgment of the Divisional Court except with regard to the latter part of it, which directs that the case shall go to the master to say whether there shall be an arbitration. I think that it ought only to go back to him for the purpose of fixing on an arbitrator.

KAY, L.J. I concur. I desire, however, not to bind myself with regard to the question whether the word "may" in the section may not in certain cases give a discretion to the Court. I conceive that cases might arise where it would be necessary to exercise some discretion. I understand that in this case it is admitted that some of the matters in dispute were clearly such as came within

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and ought to be referred under the submission. In such a case, I do not think that the Court would have a discretion to say that it would not entertain the application, assuming, of course, that all the necessary preliminary steps had been taken—that is to say, that there had been a sufficient notice within the section, and no appointment had been made within the seven days. In such a case I do not think the Court ought to exercise any discretion, if it has any; its duty under such circumstances really becomes only ministerial. I, therefore, agree that for the purposes of this case the word "may" must be treated as equivalent to "must." But I do not wish to hold that in every case "may" in this section is equivalent to "must."

Appeal dismissed.

Solicitors for the contractor: *Jaques & Co., for Lancaster & Wright.*

Solicitors for the Corporation of Leicester: *Field, Roscoe & Co., for Storey.*

E. L.

Dec. 11.

BAKER *v.* YORKSHIRE FIRE AND LIFE ASSURANCE COMPANY.

Practice—Staying Proceedings—Arbitration—Submission—Fire Insurance—Policy—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 27.

By s. 27 of the Arbitration Act, 1889, "submission" means a "written agreement" to submit present or future differences to arbitration, and by s. 4 power is given to stay any legal proceedings commenced by any party to the submission against any other party thereto.

An action on a fire insurance policy having been stayed on the ground that the policy contained a clause that any differences arising under it should be referred to arbitration:—

Held, that the policy, although not signed by the plaintiff, amounted to a submission to arbitration within the meaning of ss. 4 and 27 of the Arbitration Act, 1889, and that the action was therefore rightly stayed.

APPEAL from an order of Charles, J., at chambers, staying the action under s. 4 of the Arbitration Act, 1889.

The action was brought upon a fire insurance policy issued by the defendants to recover the value of goods, &c., destroyed by fire. The policy contained a clause that any difference arising between the company and any claimant under the policy should

be referred to arbitration. A dispute having arisen as to the amount and value of the goods destroyed in the fire, this action was brought, whereupon the defendants took out a summons to stay the proceedings, and from the order made in that summons this appeal was brought by the plaintiff.

Bailhache, for the plaintiff. The policy does not amount to a submission to arbitration on the part of the assured. By s. 27 of the Act of 1889 a "submission" is defined as being a "written agreement" to submit present or future differences to arbitration, and a "written agreement" within that section must mean an agreement reduced to writing and signed by both parties: *Caerleon Tin Plate Co.* v. *Hughes.* (1)

[A. L. SMITH, J. In that case the Court was dealing with a bought and sold note which were not identical in their terms, so that the parties were not ad idem, and the dictum in the judgment must be confined to that particular case.]

In *In re Lewis, Ex parte Munro* (2), it was held that a document containing the terms of an agreement as to costs assented to by the client, but signed only by the solicitor, was not an "agreement in writing" within s. 4 of the Attorneys and Solicitors Act, 1870. The policy may be an agreement by the plaintiff, and it is undoubtedly evidence against him which makes it impossible for him to dispute that it is his agreement; but it is not his agreement in writing, and therefore does not satisfy the requirements of s. 27 of the Arbitration Act, which requires the plaintiff to agree in a particular form.

T. Willes Chitty, for the defendants, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that this appeal must be dismissed. The action is brought upon a fire insurance policy containing the usual provision for a reference to arbitration of all disputes arising under the policy, and circumstances have arisen which have resulted in differences between the plaintiffs and the defendants as to the amount payable to the plaintiff in respect of the destruction by fire of some of the insured property. The plaintiff sues on the policy, and by so

(1) 60 L. J. (Q.B.) 640. (2) 1 Q. B. D. 724.

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suing affirms it to be his contract; he cannot disaffirm a part of the very contract on which he is suing. He contends that in order to bring into operation the arbitration clause contained in the policy, the policy must be signed by both parties; but the Act of Parliament says nothing of the kind, and the only apparent justification for the contention is to be found in *Caerleon Tinplate Co.* v. *Hughes.* (1) That decision must be interpreted, however, with regard to the particular facts of that case. There was there no complete contract; the two documents constituting the contract differed materially in their terms, and the Court said it was plain that the parties never were ad idem. That being the state of facts, it was obviously impossible to allow an arbitration to be forced on an unwilling party. The present case is absolutely different; for there is here a perfectly good contract, one of the terms of which was that disputes arising under it should be referred to arbitration; the plaintiff has not complied with that term, and his action must be stayed.

It is further said by the plaintiff, that though the policy is admittedly a good contract, there must be a written submission to arbitration, signed by the plaintiff. I do not agree with that contention, and even if I did I should stay the action until the plaintiff signed a submission.

A. L. SMITH, J. I am of the same opinion. It is an entirely novel point that is being taken by the plaintiff. The provisions of s. 11 of the Common Law Procedure Act, 1854, are well known and have been acted on for many years, and have recently been practically re-enacted in the Arbitration Act, 1889. Under the former Act many hundreds of cases of claims on fire insurance policies must have been referred under the power to stay an action given to the "parties to any deed or instrument in writing." In the present Act, the first three sections deal with the submission, and s. 4, after commencing with the words "if any party to a submission," proceeds in language practically the same as that used in the Common Law Procedure Act. It is said, however, that by the interpretation clause a submission must be a written agreement to refer

(1) 60 L. J. (Q.B.) 640.

disputes to arbitration. This, however, is not a higher interpretation than was necessarily put on the language of the old Act, under which it was the universal practice to refer these cases, and does not mean that in all cases the written agreement to refer must be signed by both parties. It is quite unnecessary to say more as to the decision in *Caerleon Tinplate Co.* v. *Hughes* (1) than that it turned entirely upon the peculiar facts of the case; for I am convinced that the learned judges who gave that decision would decide the present case in the same way that we are deciding it. My brother Charles at chambers was quite right, and his decision must be upheld.

Appeal dismissed.

Solicitors for plaintiff: *Smiles & Co., for Belcher, Cardiff.*

Solicitors for defendants: *Bell, Brodrick, & Gray, for Gray & Dodsworth, York.*

W. J. B.

[IN THE COURT OF APPEAL.]

CLEAVER AND OTHERS *v.* MUTUAL RESERVE FUND LIFE ASSOCIATION.

Insurance (Life)—Insurance in favour of Wife—Death of Insured through Crime of Wife—Public Policy—Resulting Trust in favour of Insured's Estate—Action by Executors—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 11.

The executors of a person who has effected an insurance on his life for the benefit of his wife can maintain an action on the policy notwithstanding the fact that the death of the insured was caused by the felonious act of the wife. The trust created by the policy in favour of the wife under the Married Women's Property Act, 1882, s. 11, having become incapable of being performed by reason of her crime, the insurance money forms part of the estate of the insured; and as between his legal representatives and the insurers no question of public policy arises to afford a defence to the action.

APPEAL from the judgment of the Queen's Bench Division upon a question of law raised by the pleadings and ordered to be decided by the Court pursuant to Order XXXIV., r. 2, before trial of the issues of fact.

(1) 60 L. J. (Q.B.) 640.

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The facts as alleged by the pleadings were as follows:—

The statement of claim stated that James Maybrick effected an insurance on his life with the defendants for 2000*l.*, in favour of his wife, Florence Elizabeth Maybrick. The policy stated that, for the considerations therein mentioned, the Mutual Reserve Fund Life Association received James Maybrick as a member of the said association, and that there should be payable to Florence E. Maybrick, his wife, if living at the time of the death of the said member, otherwise to the legal representatives of such member, the sum of 2000*l.*, within ninety days after receipt of satisfactory evidence to the association of the death of the said member. James Maybrick died on May 11, 1889. By his will he appointed Thomas Maybrick and Michael Maybrick his executors. On August 1, 1889, Florence E. Maybrick assigned by deed to the plaintiff Cleaver the said policy and all her interest thereunder, and notice of such assignment was duly given to the defendants before the action. On August 30, 1889, Cleaver was duly appointed administrator of the property and effects of Florence E. Maybrick under 33 & 34 Vict. c. 23, s. 9 (the Act to Abolish Forfeitures for Treason and Felony). The plaintiffs, as such assignee or administrator and executors respectively claimed payment of the insurance money.

By the statement of defence it was alleged that James Maybrick died from poison, intentionally administered to him by Florence E. Maybrick, and that she was, at the assizes held at Liverpool on July 25, 1889, tried and convicted upon an indictment charging her with the wilful murder of James Maybrick. The sentence of death passed upon Florence E. Maybrick was afterwards commuted to penal servitude for life.

The question of law to be decided was whether, if it were proved that James Maybrick died from poison intentionally administered to him by Florence E. Maybrick, that would afford a defence to the action; (*a*) as against the plaintiff Cleaver as assignee of the policy from Florence E. Maybrick; (*b*) as against the plaintiff Cleaver as administrator under 33 & 34 Vict. c. 23, s. 9; (*c*) as against the plaintiffs, Thomas Maybrick and Michael Maybrick, as executors of James Maybrick.

The Divisional Court (Denman and Wills, JJ.) gave judgment for the defendants.

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Nov. 2 and 3. *Sir Charles Russell, Q.C.*, and *Reginald J. Smith*, for the plaintiffs. The executors of James Maybrick are entitled to recover on the policy. This policy was a perfectly valid policy in its inception. So the case has no analogy to a case like *Prince of Wales Association* v. *Palmer* (1), which was decided on the ground that the insurance was a fraud ab initio. It is clear that the event happened upon which by the terms of the policy it was to become payable. The argument for the defendants is that public policy may be invoked to relieve the defendants from performing their contract. But it is contended that no question of public policy arises as between the executors and the defendants; if any such question comes in at all, it is at a later stage. The contract of the defendants was with the insured, James Maybrick. The right to recover on the policy vests in his executors, and it is only when it is a question as to the application of the money by them that considerations of public policy arise. It is argued by the defendants that the policy makes the money payable to the wife only. That is not so. It must be read by the light of the Married Women's Property Act, 1882. The contract was with James Maybrick, and, there being no trustee appointed under the 11th section, the policy, and all rights under it, vested in his legal personal representatives. They hold in trust for the wife so far only as any trust for her is legally recognisable; but if the trust for her benefit cannot legally be performed by reason of a rule of public policy, the money will form part of the insured's personal estate. Whether that be so or not, however, does not concern the defendants. They have nothing to do with the application of the money. There can be no rule of public policy that prevents the executors from recovering the money which the defendants contracted with the insured to pay upon his death, and in respect of which they have received the consideration. The rule of public policy acted upon in *Amicable Assurance Society* v. *Bolland* (2), applies only to cases where the insured, with whom the contract is made, by his own crime

(1) 25 Beav. 605. (2) 4 Bli. (N.S.) 194 (*Fauntleroy's Case*).

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causes his death. The rule in such a case is that it is against public policy that the assignees of the contracting party should receive benefit from the contract through his crime. That has no application where the death is caused by the crime of a person who is not a party to the contract: *Wainewright* v. *Bland.* (1) [They also cited *Horn* v. *Anglo-Australian Insurance Co.* (2); *Moore* v. *Woolsey.* (3)]

Sir E. Clarke, S.G., and *Hextall*, for the defendants. This insurance was obviously effected under s. 11 of the Married Women's Property Act, 1882, and it gives the whole benefit of the insurance-money to the wife, if she survives the insured. It has been held in such a case that the insurance money goes to the wife, not the husband's trustee in bankruptcy: *Holt* v. *Everall* (4). It is against public policy that a person should profit through his or her own criminal act. It was held in *Amicable Assurance Society* v. *Bolland* (5) on that principle that the assignees of a man who died through his own crime by the hands of justice could not recover on a policy of insurance upon his life. The policy must be read as subject to an implied exception of the case where the insured dies by the hands of his wife. The legal interest in the policy may be vested in the executors; but under the Married Women's Property Act, they would be trustees of the money for the wife: see *Re Dash; King* v. *Darley.* (6) The Court will not allow her through other persons to obtain a benefit which it is against public policy that she should obtain. By the terms of the policy and the 11th section of the Married Women's Property Act, the wife is the only person interested in the policy money. The trust in her favour cannot be said to have been performed. It remains unperformed. But the money cannot be recovered by her or any person suing as her trustee, because the death of the husband was caused by her criminal act. The case is similar in principle to the case where a man insures his own life and then commits suicide feloniously.

Sir Charles Russell, Q.C., in reply.

Cur. adv. vult.

(1) 1 Mood. & Rob. 481.
(2) 30 L. J. (Ch.) 511.
(3) 4 E. & B. 243.
(4) 2 Ch. D. 266.
(5) 4 Bli. (N.S.) 194.
(6) 57 L. T. (N.S.) 219.

Dec. 8. LORD ESHER, M.R. In this case the executors of the will of James Maybrick in that capacity sue the defendants upon a policy of life insurance granted by them to the testator. James Maybrick is dead, and the defendants admit that during his lifetime they granted him the policy; but they insist that they are not liable to pay the sum insured to his executors, because they would hold it in trust for the wife of James Maybrick, and his death was occasioned by the criminal act of his wife, that is to say, she murdered him. They say that it would be contrary to public policy that under such circumstances they should be compelled to pay this money to the plaintiffs, and therefore that public policy excuses them from that which would otherwise be the due fulfilment of their contract. No doubt there is a rule that, if a contract be made contrary to public policy, or if the performance of a contract would be contrary to public policy, performance cannot be enforced either at law or in equity; but when people vouch that rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires. This policy of insurance is in a somewhat peculiar form, which I suppose is of recent invention. It does not state on the face of it with whom it is made, but states that for the considerations therein mentioned the defendants make the insured a member, and promise that on his death the policy money shall be payable to Florence Maybrick his wife, if then living, otherwise to his legal personal representatives. I will first consider what the legal effect of such a policy would be apart from the Married Women's Property Act, and if no such act had been passed. The contract is with the husband, and with nobody else. The wife is no party to it. Apart from the statute, the right to sue on such a contract would clearly pass to the legal personal representatives of the husband. The promise is one which could only take effect upon his death, and therefore it must be meant to be enforced by them. The condition on which the money is to become payable is the death of James Maybrick.

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There is no exception in case of his death by the crime of any other person, not even by the crime of the wife. Therefore the condition expressed by the policy, as that on which the money is to become payable, has been fulfilled. Consequently, so far, and if no question of public policy came in, there would be no defence to an action against the defendants by the executors of James Maybrick. Apart from the statute, what would be the effect of making the money payable to the wife? It seems to me that as between the executors and the defendants it would have no effect. She is no party to the contract; and I do not think that the defendants could have any right to follow the money they were bound to pay and consider how the executors might apply it. It does not seem to me that, apart from the statute, such a policy would create any trust in favour of the wife. James Maybrick might have altered the destination of the money at any time, and might have dealt with it by will or settlement. If he had done so, the defendants could not have interfered. I think that, apart from the statute, no interest would have passed to the wife by reason merely of her being named in the policy; and, if the husband wished any such interest to pass to her, he must have left the money to her by will or settled it upon her during his life, otherwise it would have passed to his executors or administrators. The question might arise how such a policy would have to be treated at law, apart from the statute. Supposing such a policy were made in favour of some person other than the person effecting the insurance, and not being any of the persons named in s. 11 of the Married Women's Property Act—as, for instance, a nephew or niece—and supposing that the person, in whose favour the policy had been made, or to or upon whom the insurance money had been left by will or settled, became the criminal cause of the death of the insured, it would then be necessary to consider, independently of the statute, what the effect of the policy would be, and whether the insurance company could vouch this doctrine of public policy as a defence to the action. That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy.

But this doctrine ought not to be stretched beyond what is necessary for the protection of the public; and, if the matter can be dealt with so that such person should not be benefited, I do not see any reason why the defendants in such a case should be allowed to say, though they might have received premiums perhaps for thirty years and still retained the same, that public policy forbade their paying the sum of money which they had contracted to pay. It seems to me that this question of public policy does not arise as between the executors and the defendants. The question arises at a later stage. When the money is in the hands of the executors, the question arises how, under the circumstances, they must deal with it. If, in consequence of the death of the insured having been caused by the crime of a person in whose favour the policy is expressed to be made, or to or upon whom the policy-money is left by will or settled, such person is not entitled to insist on its being paid to him, but he nevertheless claims the money from the executors, they may then vouch the doctrine of public policy, and may say that by reason of it such person has forfeited his or her right to the money. What would be the consequence of that? The executors cannot be entitled to keep the money themselves. It seems to follow as a necessary result that they would hold it as part of the estate of the testator. If the Married Women's Property Act had not been passed, or if the policy had made the money payable to some person other than the insured's wife or children, I should say that, on the true construction of the policy, the only persons who could claim under it, and give a valid receipt for the money insured, were the executors of the insured; that as between them and the insurers the rule of public policy referred to could have no application, and, therefore, that the insurers must pay the money to the executors, and it would be for them to deal with it subject to the rules of public policy; but the insurers would have nothing to do with the application of the money after they had paid it. That would be a matter entirely between the executors and any person claiming the money under any will or settlement made by the insured.

But this case must be considered further with reference to the Married Women's Property Act, 1882. Sect. 11 of that Act

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provides that a policy of insurance effected by any man on his own life, and expressed to be for the benefit of his wife or of his children, or of his wife and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his debts. Therefore, it is not provided that such moneys shall never form part of the insured's estate, but only that they shall not form part of his estate so long as any object of the trust remains unperformed. That gives rise to the necessary implication, that, when no object of the trust remains unperformed, the money is to form part of his estate. Then it is provided that "the insured may, by the policy or any memorandum under his hand, appoint a trustee or trustees of the moneys payable under the policy, and, in default of any such appointment of a trustee, such policy shall, immediately on its being effected, vest in the insured and his legal representatives in trust for the purposes aforesaid." Under this provision, no trustee having been appointed, the policy vests in the executors who are trustees for the purposes of the trust in favour of the wife, but only as long as the object of the trust remains unperformed. When the object of the trust no longer remains unperformed, the policy is to form part of the estate of the insured. Suppose the wife had died before the husband, the defendants could not have said that they would not continue the policy or receive any more premiums, and that the policy was at an end. In that case the performance of the trust for the wife would have become impossible. I take it that the proper reading of the section is that, if the performance of the object of the trust has become impossible, it must be treated as if it had been performed; and, therefore, there would in such case be no object of the trust remaining unperformed. Applying the rule of public policy to this construction of the section, the wife here has by her crime rendered the trust in her favour incapable of performance. It must, therefore, be treated as if it did not exist; an object that cannot be performed cannot, for the purposes of the section, be said to remain unperformed. Then, by necessary implication, according to the section, the policy forms part of

the insured's estate. As I have said, the rule of public policy is not to be carried further than is necessary to ensure its object. On this construction of the section, it is unnecessary, under these circumstances, to vouch the rule as between the executors and the defendants. The defendants must pay the money to the executors, and then it will be for the executors to deal with it according to their duty as executors. They would be trustees of it for the wife if she had not forfeited it; but her interest being forfeited, it forms part of the insured's estate. If there are creditors, it will go to them so far as may be necessary to satisfy their claims. If anything is left, it will go to the children of the insured if there are any. The rule of public policy in such a case prevents the person guilty of the death of the insured, or any person claiming through such person, from taking the money; but the children would not claim through the mother, but through the father. What is there against public policy in such a result? I think that, if the Court were to deprive the children of the insured, who do not claim through the mother, of the insurance-money under such circumstances, on the ground of public policy, it would be a gross injustice. Any one claiming through the wife is shut out by the rule of public policy; so that any assignee from her, or other person claiming through her, cannot recover the money; but the rule of public policy does not apply as between the executors representing the estate of the insured and the defendants, and, therefore, their rights and liabilities must be governed by the contract. That contract does not make any exception in the case of the death of the insured being caused by the crime of any other person. Consequently, I think that the suggested defence fails so far as the executors of the insured are concerned. So far as regards the assignee claiming through the wife, he has no title, and has not made out his claim. For these reasons, I think that the decision of the Divisional Court was wrong, and that the appeal should be allowed.

FRY, L.J. Of the questions stated by the order of the master in this case one only has been argued before us—namely, whether the murder of James Maybrick by his wife Florence, if

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proved, would afford a defence to this action brought by the executors of James Maybrick. This question has been answered in the affirmative by the Divisional Court, and the judgment has been maintained before us by the same line of argument as was adopted by the Court, which is shortly as follows: The executors of James Maybrick, it is said, are suing as trustees for Florence, and can have no better title than their cestui que trust: it is against public policy to allow a criminal to claim any benefit by virtue of his crime; she is, therefore, disentitled to claim the proceeds of the policy in question, and the executors, who are her trustees, are equally disentitled. This line of argument appears to me equally untenable whether there be or be not such a principle of public policy as that stated. If there be not, there is no objection to the action; if there be, it disqualifies Florence Maybrick from asserting that she is the cestui que trust of the executors, and negatives the proposition that the plaintiffs are suing for her benefit. They may be suing for their own benefit or for the benefit of the estate of the deceased or of some other person; but if the principle be valid, they cannot possibly be suing for her benefit.

These observations are to my mind sufficient to dispose of the case; but, considering its importance and the fulness with which it has been argued, I shall descend somewhat more on detail. The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour. It may be that there is no authority directly asserting the existence of the principle; but the decision of the House of Lords in *Fauntleroy's Case* (1) appears to proceed on this principle, and to be a particular illustration of it. This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion. In *Fauntleroy's Case* (1) it was held to prevent the

(1) 4 Bli. (N.S.) 194.

assignees of a forger from claiming the benefit of a policy on his death at the hands of justice by reason of his forgery. It would equally apply, it appears to me, to the case of a cestui que trust asserting a right as such by reason of the murder of the prior tenant for life or of the assured in a policy; and it must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it.

James Maybrick insured his life in the policy in question in the year 1888, and by the proposal which was made part of the policy he expressed the policy to be effected for the benefit of his wife, and in the policy itself she is named as the payee of the policy-moneys in the event, which happened, of her surviving her husband. Independently of the Married Women's Property Act, 1882, the effect of this transaction was, in my opinion, to create a contract by the defendants with James Maybrick that the defendants would, in the event which has occurred, pay Florence Maybrick the 2000*l.* assured; it would be broken by non-payment to her; but the cause of action resulting from such breach would vest in the executors of the assured, and not in the payee. She was, independently of the statute, a stranger to the contract; it might have been put an end to by the contracting parties without her consent, and the breach of it would have given her no cause of action against any one.

The 11th section of the Married Women's Property Act, 1882, deals with policies like the present, effected for the expressed benefit of a wife, and, amongst other things, contains these alternative provisions. It enables the insured to appoint a trustee or trustees of the moneys payable under the policy; in default of such appointment, it provides that the policy shall vest in the assured and his legal personal representatives. It is impossible to consider the insertion of the name of Florence Maybrick in the policy as the nomination of her as trustee for herself; there is no nomination of any other trustee; consequently the statute applied, and, in spite of her nomination as payee, vested the policy in James Maybrick and his legal personal representatives—namely, the plaintiffs. The section in question goes further, and declares the trusts on which such a policy is to be

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held. According to its language, the effecting of this policy created a trust in favour of the object named—that is, Florence Maybrick—and the section enacted that the moneys payable under it should not, so long as any object of the trust remained unperformed, form part of the estate of the insured. Now, the trust thus created by statute, and the language of the statute creating it, must, in my opinion, be both subject to the principle of public policy which I have stated—namely, the trust is one which cannot be enforced by a murderess of her husband, and the language of the statute must be read as if it contained an exception of such a case. Consequently the trust which the statute was intended to create has either never arisen or it has, by the act of the cestui que trust, become incapable of enforcement. If the executors of the insured were in such a case as the present to refuse to sue the office, it is inconceivable to me that the murderess could maintain a suit against them to enable her to use their names; or, in fact, that she could be allowed to sue in any way in a Court of Equity as cestui que trust of a fund which she had created by her crime. But if the executors are not trustees for Florence Maybrick, for whom are they trustees? This question seems to admit of an easy answer. Whenever there is property produced by the payments of A. which is held in trust for B., and that trust fails or is satisfied, a resulting trust arises for A. or his estate. This resulting trust is recognised by the section of the Act in question, because it takes the property out of the estate of the insured so long as any object of the trust remains unperformed: language which implies, if it does not assert, that when no object of the trust remains to be performed the policy-moneys form part of the estate of the insured. If it be suggested that this view only removes the difficulty a step further off, and that the possible right of the wife under her husband's will or intestacy forms an objection to the action by the executors, the reply is obvious—that the principle of public policy must be applied as often as any claim is made by the murderess, and will always form an effectual bar to any benefit which she may seek to acquire as the result of her crime. It follows from the view which I have expressed that I think it needless to inquire what the particular trusts may be on which

the convict's property is held by the administrator appointed under the statute of 1870. He took only the property which Florence Maybrick had in the moneys in question; and as she took nothing, in my judgment, by reason of her crime, he takes nothing likewise.

It may be argued that having regard to the fact that Mrs. Maybrick is the prime object of the insurance, and that she is named on the face of the policy as payee, the contract of insurance must be taken to imply an exception of the case of the death of the insured when caused by the crime of the person so named; and it is suggested that *Fauntleroy's Case* (1) in the House of Lords supports this contention. This argument does not appear to me to be tenable. The policy is effected under, and therefore affected by, a statutory enactment, the effect of which in the present case is to vest the policy in the executors of the insured as trustees in the event of Mrs. Maybrick's being entitled to claim in trust for her, and in every other event in trust for the estate of James Maybrick,—just in the same way as if before the statute a policy had been taken out by James Maybrick, and he had by a separate instrument declared the like trusts of it. Now, it is to my mind illogical to make the crime of one cestui que trust a bar to the claim of another, or of the trustees for that other cestui que trust; and if the supposed defence were to prevail we should so hold. If Mrs. Maybrick had inflicted a mortal, but not immediately fatal, wound on her husband, had then committed suicide, leaving him surviving, and his executors had claimed on his death, it appears to me that the crime which caused his death would have furnished no defence. In a word, I think that the rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights. In *Fauntleroy's Case* (1) the plaintiffs were the assigns of the criminal, and were claiming through him. In the present case the plaintiffs are the assigns in law of the innocent husband, and are claiming through him. The authority, therefore, of that case goes to shew that neither Florence Maybrick nor the administrator of her estate, who claims through her, can

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take any benefit. But that appears to me to throw no impediment in the way of a suit by those who claim with clean hands themselves and as assigns of the innocent insured. In a word, it appears to me that the crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights. In my opinion, therefore, public policy prevents Florence Maybrick from asserting any title as cestui que trust of this fund, and thereby brings into operation the resulting trust in favour of the estate of the insured, and so enables the executors to maintain an action as plaintiffs without any taint derived from the crime committed by Florence Maybrick.

LOPES, L.J. The action is brought by the personal representatives of James Maybrick, and the question we have to consider is whether the crime of his wife, Florence Maybrick, incapacitates them from recovering upon the policy of insurance effected by the husband with the defendants the amount of the policy-money, which, by the terms of the policy, is made payable to the wife if she survive the husband. The contract was between the husband and the defendants. The husband died by the criminal act of the wife. The right of action upon the contract passes to the legal personal representatives upon his death. I do not doubt that the principle of public policy would prevent the wife from recovering the amount of the policy money from them, and so reaping benefit from her crime; because no trust can be enforced which contravenes the law. The simple answer to the defence set up is that the executors are entitled to say that they are suing for the benefit of the estate of the deceased husband; and, therefore, no question of public policy arises. It appears to me clear that such would have been the case, if the Married Women's Property Act, 1882, had not been passed. I agree with the Master of the Rolls and Lord Justice Fry, that the effect of the section of that Act which has been referred to is to create a resulting trust in favour of the husband's estate which takes effect when by reason of the crime of the wife the trust in her favour becomes incapable of being performed in consequence of

the rule of public policy. The trust in favour of the wife must then be regarded as struck out, and, that being so, a resulting trust in favour of the husband's estate arises. For these reasons, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiffs: *Sharpe, Parkers, & Co., for Cleaver, Holden, & Co.*

Solicitors for the defendants: *Robinson & Stannard.*

E. L.

RADCLIFFE *v.* BARTHOLOMEW.

Nov. 9.

Justices—Jurisdiction—Time within which Complaint must be made— 12 & 13 *Vict. c.* 92, *s.* 14.

By s. 14 of the Act for the Prevention of Cruelty to Animals (12 & 13 Vict. c. 92), every complaint under the provisions of the Act is to be made "within one calendar month after the cause of such complaint shall arise." On June 30 an information was laid against the appellant in respect of an act of cruelty alleged to have been committed by him on May 30. An objection to the jurisdiction of the justices having been taken, on the ground that the complaint had not been made within one calendar month after the cause of complaint had arisen:—

Held, that the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made; that the complaint was therefore made in time, and the justices had jurisdiction to hear the case.

CASE stated by justices.

An information under 12 & 13 Vict. c. 92, s. 2, was laid on June 30, 1891, by the respondent against the appellant, charging him with ill-treating certain sheep on May 30, 1891. By s. 14 of that Act it is enacted that "every complaint under the provisions of this Act shall be made within one calendar month after the cause of such complaint shall arise." At the hearing before the justices a preliminary objection was taken on behalf of the appellant that, as the offence was alleged to have been committed on May 30 and the information was not laid until June 30, the complaint had not been made "within one calendar month" after the cause of complaint had arisen, and that therefore the justices had no jurisdiction to hear the case. The justices

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overruled the objection on the ground that in computing the calendar month the day on which the cause of complaint arose ought to be excluded, and that the complaint had therefore been made in time; but before hearing the case upon the merits, they stated this case for the opinion of the Court. The question for the opinion of the Court was whether the proper construction of the term "within one calendar month" in s. 14 had been placed upon it by the justices.

J. A. Foote, for the appellant. In civil proceedings the rule has been to exclude the day on which the act is done from the computation of the time within which the proceeding by way of action, appeal or otherwise, ought to be taken: *Hardy* v. *Ryle* (1); *Williams* v. *Burgess* (2), the reason being that in such proceedings the time "within" which an act has to be done is construed as meaning the time most beneficial to the person concerned. But in criminal cases a different rule must prevail, the limitation of the period within which an alleged offence may be prosecuted being a restriction imposed for the protection of the person who has committed the alleged offence; and the day of the offence ought to be included in the computation of the time for taking proceedings. This is clearly the case in charges of homicide; for the period of a year and a day within which death must ensue in order to make the offence one of murder includes the day on which the act was committed: Hawkins' Pleas of the Crown, bk. i. c. 31, s. 9; East's Pleas of the Crown, p. 343.

[WILLS, J. In *Reg.* v. *Justices of Middlesex* (3), where upon a conviction under the Turnpike Act the defendant might give notice of appeal "within six days after" his cause of complaint arose, it was admitted that the day of the conviction of which he complained was to be excluded in reckoning the six days.]

Colam, for the respondent. The rule in civil proceedings is perfectly clear, and there has been no difference of opinion upon it from the time of *Williams* v. *Burgess* (2), where it is expressly said that it is undesirable to encourage doubts on the point. The language of the statute in that case is precisely the same as

(1) 9 B. & C. 603. (2) 12 A. & E. 635.
(3) 2 Dowl. N. S. 719.

in the present, and there is no authority for drawing any distinction between civil and criminal cases.

WILLS, J. I am of opinion that the decision of the justices was right. Unless there is something in the suggested distinction to the effect that the same words are to be construed differently in civil and criminal cases, I think that the case is really governed by authority, and that of a very cogent kind. In *Williams* v. *Burgess* (1), the language of the section was "within twenty-one days after the execution," and it was held that the day of execution was there to be reckoned exclusively. In *Hardy* v. *Ryle* (2), which was an action against a justice for trespass and false imprisonment, the plaintiff had been discharged from custody on December 14, and brought his action on June 14 following; s. 8 of 24 Geo. 2, c. 44, prescribed that "no action shall be brought against any justice of the peace for anything done in the execution of his office unless commenced within six calendar months after the act committed." Except as to the difference between one month and six months, those words are the same as those which we are now interpreting, and it is impossible to draw any distinction between the language of the two enactments. In that case the Court held that an action brought on June 14 in respect of a cause of action which had arisen on December 14 was in time, because the day on which the cause of action arose was excluded from the computation of the six months, while that on which the action was brought was included in it. It is true that the reasoning by which this decision was supported was criticised by Parke, B., in *Young* v. *Higgon* (3), but that learned judge suggests no doubt as to the correctness of the conclusion. At the end of his judgment occur the cogent remarks: "Apply the criterion which has been before suggested—reduce the time to one day, and then see what hardship and inconvenience must ensue if the principle I have stated is not to be adopted;" and these remarks are entirely applicable to the present case. The result of reducing the time to one day would be that an offence might be

(1) 12 A. & E. 635. (2) 9 B. & C. 603.
(3) 6 M. & W. 49.

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committed a few minutes before midnight, and there would only be those few minutes in which to lay the complaint, which would be to reduce the matter to an absurdity. Therefore, unless a distinction can be established between a statute dealing with criminal, and one dealing with civil, procedure, this case is concluded by authority. It is to be remarked that in *Hardy* v. *Ryle* (1) the enactment was not passed for the purpose of giving the plaintiff a right to sue, but in order to impose a limitation on his unrestricted right, and the authority of that and similar cases is therefore most direct and cogent.

It has been suggested that there is a distinction between the construction to be placed on these words according as they occur in statutes dealing with civil or criminal matters, and that in the latter case the day on which the offence is committed ought to be included in the computation of the time allowed for laying the complaint; but no authority has been shewn for the existence of such a rule, which would be most unsatisfactory in its operation if it really existed. Great mischief might, and almost certainly would, arise from altering the canon of construction of the same words, according to the subject-matter with which they dealt; and there being no authority in support of so broad a proposition, I am certainly not inclined to make one. The complaint was therefore in time, and the justices must proceed with the hearing of the summons.

LAWRANCE, J. I am of the same opinion.

Judgment for the respondent.

Solicitors for appellant: *Wainwright & Baillie, for Sir R. N. Howard, Weymouth.*

Solicitor for respondent: *Alfred Leslie.*

(1) 9 B. & C. 603.

W. J. B.

[IN THE COURT OF APPEAL.]

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Nov. 12, 13;
Dec. 18.

METROPOLITAN RAILWAY COMPANY *v.* FOWLER.

*Revenue—Land Tax—Liability to Assessment—"Hereditament"—Railway Tunnel—*38 *Geo.* 3, *c.* 5, *s.* 4.

By s. 4 of 38 Geo. 3, c. 5, "All and every manors, messuages, lands and tenements, and also all quarries, mines, iron mills, furnaces, and other iron works, salt springs and salt works, all alum mines and works, all parks, chaces, warrens, woods, underwoods, coppices, and all fishings, tithes, tolls, annuities, and all other yearly profits, and all hereditaments of what nature or kind soever they be," are charged with land tax.

A railway company were by their special Act authorized to construct an underground railway, and to enter upon, take, and use such of the lands delineated upon certain deposited plans as might be required for that purpose. The Act provided that with respect to any of those lands which were in or under the roadway or footway of any street the company should not be required wholly to take those lands or any part of the surface thereof, but they might appropriate and use the subsoil and under-surface of any such roadway or footway.

In pursuance of the powers thus conferred on them the company constructed a tunnel under the footway and roadway of a public street. In doing so they removed the subsoil and built an arch in brickwork, with walls four or five feet thick, the foundation being permanently built in the soil. The rails of the railway were laid at the bottom of the arch. After the tunnel was constructed the company had the sole use and occupation of it for the purposes of their railway:—

Held, that the right or interest of the company in the tunnel was a "hereditament":

Held, by Lord Esher, M.R., and Kay, L.J. (Lopes, L.J., dissenting), that the company were chargeable with land tax in respect of the tunnel.

APPEAL against a decision of the Queen's Bench Division (Cave and Vaughan Williams, JJ.), upon a special case stated for the opinion of the Court, under Order XXXIV. of the Rules of the Supreme Court, 1883, in an action by the plaintiff company for damages for wrongful entry of the defendants on the plaintiffs' premises, and wrongful seizure by them of the plaintiffs' goods under a distress in respect of a claim for land tax. The defendants were the Commissioners of Land Tax for the City of London, and their bailiff, and the question was, whether a tunnel through which a portion of the plaintiffs' line of railway passed was assessable to land tax under the Act 38 Geo. 3, c. 5.

The special case contained statements to the following effect.

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By s. 1 of the Act it was enacted that a specified sum should be raised within Great Britain "by such proportions, and in such manner and form as hereafter in this Act are expressed."

By s. 4 it was enacted that "all and every manors, messuages, lands and tenements, and also all quarries, mines of coal, tin, and lead, copper, mundic, iron, and other mines, iron mills, furnaces, and other iron works, salt springs and salt works, all alum mines and works, all parks, chaces, warrens, woods, underwoods, coppices, and all fishings, tithes, tolls, annuities, and all other yearly profits, and all hereditaments, of what nature or kind soever they be" within England, Wales, or Berwick, "and all and every person and persons, bodies politic and corporate . . . . having or holding any such manors, messuages, lands, tenements, or hereditaments, or other the premises, in respect thereof," should be charged "with as much equality and indifference as is possible, by a pound rate," for or towards the sum imposed by the Act.

By the Metropolitan and District Railways (City Lines and Extensions) Act, 1879 (42 & 43 Vict. c. cci.), s. 5, the plaintiff company, in conjunction with the Metropolitan District Railway Company, were authorized to make and maintain certain railways and other works in the Act mentioned, and for that purpose to enter upon, take, and use such of the lands delineated on the deposited plans as might be required for that purpose. Among the railways authorized by this Act was a line therein described as "Railway No. 1," which was to effect a junction between the Mansion House station of the District Company and the Aldgate station of the Metropolitan Company.

By s. 2 the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, and the Railways Clauses Consolidation Act, 1845, were (except where expressly varied by the Act) incorporated with it, and made applicable to each of the two companies.

By s. 16: "With respect to any lands which the two companies are by the provisions of this Act authorized to enter on, take, and use for the purposes of the railways . . . . and works, and which are in or under the roadway or footway of any street, road, or highway, the two companies shall not be required wholly to take those lands, or any part of the surface thereof, or any cellar,

vault, or other construction therein or thereunder, held or connected with any house in any such street, road, or highway, but the two companies may appropriate and use the subsoil and under-surface of any such roadway or footway, and, if need be, they may purchase, take, and use, and the owners of and other persons interested in any such vault, cellar, or arches, shall sell the same, for the purposes of the railways . . . and works, or any of them; and the purchase of any such cellar, vault, or construction shall not in any case be deemed the purchase of a part of a house or other building or manufactory within s. 92 of the Lands Clauses Consolidation Act, 1845."

By s. 17: "Nothing contained in the section of this Act with respect to underpinning houses near the railways, or in the section of this Act authorizing the two companies to acquire easements only under roads, &c. . . . and purchase cellars, &c. . . . . nor any dealing with the lands in pursuance of those sections, or either of them, shall relieve the two companies from the liability to compensation under the 68th section of the Lands Clauses Consolidation Act, 1845."

By the Metropolitan Railway Act, 1881 (44 Vict. c. xxv.), s. 5, the plaintiff company were empowered alone to make so much of the Railway No. 1 as lay between Trinity Square and High Street, Aldgate.

The section of the railway which the plaintiffs were thus authorized to make passed under a public street or highway, consisting of both foot and roadway, and known as the Crescent, Minories. The plaintiffs proceeded to make the railway, and in the proper exercise of their powers and during the construction disturbed the surface, and entered, appropriated, and used the surface, subsoil, and under-surface of so much of the Crescent, Minories, as was necessary for the construction of the railway, and after removing the same they made their line below and across the street on the space thus created. They did not purchase nor, except for the purpose of and whilst making the arched tunnel, take or use any portion of the surface of the street. The portion of the railway passing under the street occupied solely the position of the subsoil removed for the purpose of its construction. The railway was constructed through the land by entering into

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possession of the surface for the purposes of and during construction, and then by a system known as the "cut and cover" system—viz., the cutting or excavating the soil, and building an arch in brickwork, of a thickness of four feet or five feet, over the excavation to inclose the railway. The arch was then covered with soil. The foundation of the arch was permanently built in the soil. The plaintiffs entered into a contract for letting the use of the railway to a firm of advertisement contractors, without excepting those parts of the railway which lay under streets. The plaintiffs had never paid any rent or purchase-money in respect of their entry upon, appropriation, use, and removal, or in respect of the occupation by their line, of the space thus created. The plaintiffs were—until the District Railway Company, after the issue of the writ in this action, exercised their powers under 47 & 48 Vict. c. ccxxix. s. 20—the sole owners of the railway, and kept it in repair, and had the sole use and occupation of it. The railway was opened in September, 1882. The plaintiffs had never received any tolls or yearly profits in respect of the portion of their railway under the Crescent, Minories, otherwise than by means of the fares paid to them for the carriage of passengers and goods in the trains of the company passing over the same. The plaintiffs were assessed by the defendants to the land tax for the year ending March 24, 1883, in respect of the tunnel, at an annual value of 80*l*. The plaintiffs having refused to pay, the Commissioners distrained on the plaintiffs' goods, and the plaintiffs thereupon brought this action.

The question stated by the special case for the opinion of the Court was, whether the plaintiffs were liable to be assessed towards the payment of land tax in respect of the tunnel under the street. In the Divisional Court, Cave, J., held that the plaintiffs were liable to be assessed, while Vaughan Williams, J., held that they were not. The latter learned judge, as junior judge, withdrew his judgment, and judgment was entered for the defendants. The plaintiffs appealed.

Balfour Browne, Q.C., and *J. Lawson Walton, Q.C.* (*Sir R. E. Webster, A.G.*, with them), for the plaintiffs. The interest of the plaintiffs in the tunnel is not a "hereditament" within the

meaning of the Land Tax Act, s. 4. They have only an interest in the nature of an easement or servitude, a right of user for the conveyance of passengers and other purposes subsidiary thereto. Sects. 16, 17, and 44 of the special Act shew that it was only contemplated that they should acquire an easement, and not any estate or property in the land. *Chelsea Waterworks Co.* v. *Bowley* (1) is an authority that a right of this sort is not a hereditament within the Land Tax Acts.

[LOPES, L.J., referred to *Reilly* v. *Booth.* (2)

KAY, L.J. An easement involves the existence of a dominant and a servient tenement: *Mounsey* v. *Ismay.* (3) Where are the dominant and servient tenements here?]

The company possesses land on each side of the piece of tunnel in question, and it serves as a communication between them. The ownership of the land would remain vested in the owner of the subjacent strata—so there is both a dominant and a servient tenement.

Secondly, assuming that the company have more than an easement, it is contended that the Land Tax Act primâ facie contemplates the ordinary case of surface lands, and only applies to such matters under the surface as are expressly mentioned in s. 4 of 38 Geo. 3, c. 5. That section refers expressly to "mines," and the words "lands and tenements" and "hereditaments" must be limited on the same principle as has been applied to the construction of the statute 43 Eliz. c. 2, with regard to poor-rates, in the case of mines other than coal mines. Otherwise a double taxation would be involved. Suppose the land tax on a piece of land were redeemed; the redemption would be taken to cover the whole of the land, both the surface and that which is below. Then, if a tunnel such as this is made, can that resuscitate the land tax? There is nothing in the Land Tax Act to authorize the assessment of different strata separately, except in the case of mines. There is no instance of subject-matters under the surface being assessed to land tax except in that case.

Scrutton, and *Thomas Hewitt*, (*French, Q.C.*, with them), for the

(1) 17 Q. B. 358. (2) 44 Ch. D. 12.
(3) 1 H. & C. 729; 3 H. & C. 486.

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defendants. The plaintiffs have more than an easement. They have exclusive possession of the tunnel. The special case states that they are the owners, and in the use and occupation of the tunnel. It is a corporeal hereditament. In *Reg.* v. *East London Waterworks Co.* (1) Lord Campbell, at p. 716, explained the meaning of the decision in *Chelsea Waterworks Co.* v. *Bowley.* (2) That case depended on the view that there was not there any permanent occupation of the soil. The water-pipes were treated as chattels which might be removed and laid down elsewhere at any time. The same cannot be said of the brickwork of this tunnel, which is a solid and permanent structure. The owner of the surrounding soil has no right or power to use the tunnel for any purpose. [They were stopped by the Court on this point.]

With regard to the second point, so far as the practice is concerned, there are instances, as in Gray's Inn, in which sets of chambers below the level of the surface have been separately assessed to land tax. There is no reason why the land should not be divided into hereditaments horizontally, as well as vertically, for the purposes of land tax. When a separate hereditament is created in respect of some subjacent portion of the realty, and rendered valuable by application to some purpose, so that a valuable subject-matter of taxation comes into existence, there is no reason why it should not be taxable under the Act. There is no reason why the words "lands and tenements" and "hereditaments of what nature or kind soever" in the Act should receive other than their natural interpretation. The things specially enumerated do not constitute a class, and are not necessarily confined to things above-ground.

[They cited also *Waterloo Bridge Co.* v. *Cull.* (3)]

Balfour Browne, Q.C., in reply. In Gray's Inn, the land tax is assessed on the whole inn, and, by virtue of a domestic arrangement, the tenants of chambers contribute to pay it. In *Waterloo Bridge Co.* v. *Cull* (3), tolls were assessed to land tax: but tolls are mentioned in the Act. The generality of the words, "all hereditaments of what nature or kind soever they be," in s. 4 of the Act, is cut down by the previous words, "and also." There

(1) 18 Q. B. 705. (2) 17 Q. B. 358.

(3) 1 E. & E. 213.

is no reported case to be found in which anything but the surface of land has been assessed to land tax, except those things below the surface which are expressly mentioned in s. 4.

Cur. adv. vult.

Dec. 18. LORD ESHER, M.R. The question for our decision, which arises upon a special case stated for the opinion of the Court, is, whether the Metropolitan Railway Company are liable to pay land tax in respect of a tunnel upon their line of railway. The two learned judges who heard the case in the Court below differed, the one being of opinion that the company are liable to pay land tax in respect of the tunnel, the other being of opinion that they are not.

This is the point which we now have to determine.

Now, the first question is this, What is the legal interest of the railway company in the tunnel, or in the space which is occupied by it? Is the interest a mere easement, or is it a hereditament? The distinction between the two has been stated in previous cases; but I think it has been as well if not better expressed by my brother Lopes than by any other judge, in *Reilly* v. *Booth* (1), although others have come to the same conclusion, viz., that if the interest which the owner has is an interest in land it is a "hereditament." An easement is some right which a person has over land which is not his own; but, if the land is his own, if he has an interest in it, then his right is not an easement. You cannot have an easement over your own land; and if your right is an interest in land it is a hereditament. Can it then be said that a tunnel which is made within the bounds of land which the railway company have acquired is a mere right of way? That is the only right in the nature of an easement which it could be. But it cannot be that, because it is undoubted that the tunnel is theirs, if it is made on land acquired by them and of which they are the owners. Therefore, I cannot entertain a doubt that the company have an interest in the land which is occupied, so to say, by the tunnel. They have an interest in the tunnel, and in the land which is occupied by it; they have not a mere easement. If they have an interest in land, then that

(1) 44 Ch. D. 26.

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by the ordinary law is a hereditament. What it is within the meaning of the Act (38 Geo. 3, c. 5) which we have now to construe is another matter.

The 4th section says: "And to the end the full and entire sum by this Act charged upon the several counties, cities, &c., may be fully and completely raised and paid to His Majesty's use; be it further enacted, that all and every manors, messuages, lands and tenements, and also all quarries, mines of coal, tin and lead, copper, mundic, iron and other mines, iron mills, furnaces, and other iron works, salt springs and salt works . . . ., and all fishings, tithes, tolls, annuities, and all other yearly profits, and all hereditaments of what nature or kind soever they be, situate, lying and being, happening or arising, within the several and respective counties, cities, boroughs, towns, or places aforesaid respectively, or within any parts of the same . . . ., and all and every person and persons, bodies politic and corporate, guilds, mysteries, fraternities, and brotherhoods, whether corporate or not corporate, having or holding any such manors, messuages, lands, tenements, or hereditaments, or other the premises, in respect thereof shall be charged with as much equality and indifference as is possible, by a pound rate, for or towards the said several and respective sums by this Act set or imposed."

Is then this interest in land, which is a "hereditament," a matter in respect of which the railway company, who are the owners of it, are bound to pay land tax? A difficulty arose in this way. It is obvious that this tunnel is underneath the surface of the land, and it might be, as it is in this case, that a railway company would be entitled to a tunnel, although they were not entitled to the surface of the land. The right which they have is a statutory one, and that right might well be that the company should have the land in which they are to make their tunnel, and which is occupied by their tunnel, and yet have no right to the surface. If their right in the tunnel, which must certainly be considered as a separate hereditament for this purpose, differs from the right to the surface, can they be compelled to pay land tax in respect of that distinct right? There might be two rights: the right to the surface, and the right to the tunnel which is beneath the surface. It has been strongly

urged that the company, if they had the surface, would be taxable for the surface; and they might redeem that; and, if they redeemed the land tax in respect of the surface, that, primâ facie at all events, would redeem the land to the centre of the earth—the whole land. Then, it is said, they would have redeemed the land in which the tunnel is, and, after having redeemed it, and paid the price for the redemption, they would have to pay land tax again in respect of the tunnel. That is a formidable objection. But, in my opinion, the answer to it is this. If the land is in its ordinary normal condition, without any taxable interest below the surface, then it is quite true that when you redeem the surface you redeem the land to the centre; but, in my view, if there is a separate and independent interest in land, distinct from the mere land in its ordinary normal condition to the centre, then, when you redeem the surface, you do not redeem that separate and distinct interest. By redeeming the surface you redeem the whole land, only when it is in its ordinary normal condition as mere land. For instance, suppose there is a mine below the surface, it cannot be doubted but that the mine, by virtue of the express words of this Act, is a separate interest in land which is taxable, and that one person may be taxed for the surface, and another for the mine. Suppose there is an undiscovered mine below the surface at the time when the owner of the surface redeems the land tax, does he redeem the land tax in respect of the mine? He may think that he does, but in truth and in fact you do not pay one shilling more on account of the depth of the land when you are redeeming the land tax to the centre. In my view, if an unknown and undiscovered mine is there, nevertheless, when you redeem the land tax you only redeem so much of the land below the surface as is in its ordinary and normal condition, without any distinct interest being there, and you do not redeem in respect of any new and distinct interest which may afterwards arise. Therefore, it is, in my opinion, not correct to say that when you have redeemed in respect of the mine, you can afterwards be taxed in respect of the mine. But, even if it were otherwise, it cannot be doubted, for the Act is clear and distinct, that one person may be taxed for the surface, and another for a mine beneath it, and when the

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mine is discovered to be there, then the owner of it, whether he be the same person as the owner of the surface or another person, is taxable in respect of the mine. Therefore, as regards the first objection, I do not see the force of the difficulty which has been raised.

But the next point is this, that, if the difficulty does arise in respect of mines, at all events it cannot be helped. The words of s. 4 are, "mines of coal, tin and lead, copper, mundic, iron, and other mines," and various other things, and then the enumeration is ended by the words, "and all hereditaments of what nature or kind soever they be." Now, what is the ordinary rule of construction? We cannot disregard those words; we cannot say they have no effect at all. What effect have they? They must mean hereditaments, not the same as, but of the same kind, with respect to the subject-matter, as those which have been more particularly mentioned before. You tax the surface of the land; you tax the land as if it were ordinary land; you tax all the land which is not occupied by one of these separate and distinct interests. You may tax those distinct interests; you may tax something which is below the surface—for instance, a mine. A mine is a hereditament. You tax an interest in land which is below the surface, and is of the same kind as a mine. Then, when you come to the general words, you have something below the surface which is a hereditament and has the same relation to the land, treating it as surface or ordinary land, as a mine has. It seems to me, therefore, that the express words of the Act, "all hereditaments of what nature or kind soever they be," when you interpret them according to the general rule, will apply to any hereditament; that is, any interest in land which stands in the same relation to the surface as do mines and the other things which are mentioned, and which, although they are below the surface, are made taxable as well as the surface, understanding, as I have said, the word "surface" as meaning the land in its ordinary condition, when there is no interest in it which any person has other than the interest in the surface.

I think, therefore, that this case comes within the very words of the Act, and that the railway company are taxable in respect of that interest in land which they have in the tunnel, and

which is a hereditament of the same kind as a mine. I put a case during the argument in which I should have no doubt that there would be a taxable interest below the surface. If you were to enter upon the face of a perpendicular cliff at the seaside, and to excavate it, and to place there a valuable property, as, for instance, a casino, or something of the kind, to which people at the seaside might go for their amusement, that would create a valuable interest in the land below the surface, which would be subject to land tax, although the same owner or another owner were taxable in respect of the top of the cliff, and in respect of the cliff itself, so far as there was no distinct interest in it.

For these reasons, I agree with Cave, J., that the company are taxable in respect of this tunnel.

LOPES, L.J., read the following judgment:—I agree with the rest of the Court that the plaintiffs took more than an easement. They took the exclusive and unrestricted use of a piece of land. I adhere to what I said in *Reilly* v. *Booth* (1): "The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to the law which gives exclusive and unrestricted use of a piece of land. It is not an easement in such a case; it is property that passes."

But I do not agree with the other members of the Court that this tunnel is assessable to land tax.

What is the assessable property? The following are declared liable to assessment by s. 4 of 38 Geo. 3, c. 5: "all and every manors, messuages, lands and tenements." These are very comprehensive words, and relate beyond doubt to the surface. Then follow the words: "and also all quarries, mines of coal, tin and lead, copper, mundic, iron and other mines." I presume the idea was, that when there were valuable underground properties in the shape of mines they were not to escape being charged because the surface was assessed, but were to be assessed to the land tax in addition; so that in such cases there would be a double tax, partly for the surface, and partly for the mines underneath. Then follow the words, "salt springs and salt works, all alum

(1) 44 Ch. D. at p. 26.

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mines and works," properties which might be either underground or on the surface. Then we find: "all parks, chaces, warrens, woods, underwoods, coppices." It is difficult to understand why these properties are specifically mentioned, because they would be covered by the description "lands and tenements" appearing earlier in the section: perhaps they are introduced for caution, in order to shew that these kinds of properties are not to escape assessment. Then come the words, "and all fishings, tithes, tolls, annuities, and all other yearly profits." These words introduced a new kind of property—property of an incorporeal nature, not previously dealt with. The section winds up with this sweeping clause: "and all hereditaments, of what nature or kind soever they be, situate, lying and being, happening or arising," within the places aforesaid.

It is sought to bring the tunnel within these last words. It is said it is a hereditament. No doubt it is; but is it a taxable hereditament within the meaning of this section, having regard to the fact that the surface is already assessed to the land tax?

I think not. I agree with the view of Vaughan Williams, J. As a hereditament, it is already assessed as land—assessed, I presume, as a hereditament to the centre of the earth. Unless it can be brought within one of the kinds of property specially mentioned in s. 4, I do not see how it can be assessed again. If there was a mine under the surface of the land, there would be an assessment for the land and an assessment for the mine, because mines are specifically mentioned. So, again, if there were under the surface any of the underground properties mentioned in the section. But, there not being in this case any of the properties specifically mentioned under the surface, it appears to me that the assessment is exhausted when the surface has been taxed.

Suppose the land tax in respect of the land under which the tunnel is had been redeemed before the tunnel was constructed, that redemption would have extended to the centre of the earth, and would have exonerated that land from all liability to land tax, unless the tunnel could be brought within any of the kinds of property specifically mentioned in s. 4. It is a tunnel, and cannot be brought within any of those descriptions. I cannot, therefore, think that it is assessable to land tax. If it was, there

would be imposed a double tax in a case not falling within any of the descriptions of property mentioned in the section as to which a double tax is authorized. The other members of the Court, however, differ from me, and agree with the senior judge in the Divisional Court. The appeal must, therefore, be dismissed with costs.

KAY, L.J., read the following judgment:—The statute 38 Geo. 3, c. 5, made the land tax perpetual. It fixed the amount to be paid by the various counties, cities, boroughs, towns, and places in England and Wales, and, by s. 4, "to the end the full and certain sum by this Act charged upon the several counties, cities, boroughs, towns, and places . . . . as aforesaid may be fully and completely raised and paid," it was enacted that certain properties therein described "shall be charged with as much equality and indifference as is possible, by a pound rate," to be paid by four quarterly payments. The machinery for making the assessment was, by ss. 7 and 8, that certain commissioners, who were to meet as often as necessary, should arrange which of them should act in the several divisions or hundreds, and those appointed to act within each of such hundreds or other divisions were to cause the proportions charged upon such division to be equally assessed, and for that purpose to appoint assessors, who were with all care and diligence to assess the full sum upon the various properties. It is obvious from this brief sketch of the statute that the assessment upon each description of property charged must be made according to the value of such property, as nearly as it can be ascertained, by a "pound rate," which I understand to mean so much for every pound of annual value. And, as the total charge within each division is fixed by the Act, the greater the number of properties among which it is divided the less would each have to pay. And, conversely, if any property which should be charged were omitted, or were charged with too small a sum, the other properties within the division would be charged by so much more than they ought to bear.

This being the general scheme of the Act, I should expect to find the words describing the properties which are to be charged as comprehensive as possible. All properties in land of every

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sort and kind which produce an annual income ought primâ facie to bear a share of the tax. And it would be proper, according to the canon of construction of Acts of Parliament in any case of doubt, to give to ambiguous words the largest meaning which they could fairly bear, so as to effectuate that equal distribution of the charge upon all properties producing any income to the holders, which is the obvious intent and purpose of the statute.

We have to determine what the properties to be so charged include. They are described in s. 4. The first words of description are, "all and every manors, messuages, lands, and tenements." These words certainly refer to the ordinary occupation of the surface of real property. Then follow words which shew that certain other portions of the soil are to be charged in addition: "and also all quarries, mines of coal, tin and lead, copper, mundic, iron, and other mines." That is, although the surface may be taxed, these mines below the surface, when opened, may be taxed also. Then follow "iron mills, furnaces, and other iron works." These would be above-ground, and are to be taxed, nevertheless, in addition to the ordinary tax of the surface. I presume that the object of these words is to shew that not merely the agricultural value of the surface in country places is to be taken, but also the additional value of such mills, furnaces, and works where they exist. The section continues: "salt springs and salt works, all alum mines and works," which would probably be underground. Then come the words, "all parks, chaces, warrens, woods, underwoods, coppices." Now, these words include surface tenements, which are within the first words "lands and tenements," and yet they are expressly mentioned, although the mention is a repetition. I presume that the meaning is, that that kind of property might have but small value, if the actual pecuniary return from it in each year was only regarded, and that, therefore, it must be assessed at some value beyond that of the annual profit. Next come the words, "and all fishing, tithes, tolls, annuities, and all other yearly profits." These words include certain incorporeal hereditaments. Then follow words which are very important: "and all hereditaments of what nature or kind soever they be, situate, lying, and being, happening or arising, within the several" counties or

places aforesaid. And the section proceeds to say, that "all and every person and persons, bodies politic and corporate, guilds, mysteries, fraternities, and brotherhoods, whether corporate or not corporate, having or holding any such manors, messuages, lands, tenements, or hereditaments, or other the premises, in respect thereof shall be charged with as much equality and indifference as is possible, by a pound rate," towards the sum to be provided by the division in which their hereditaments are situate.

The effect of this section is expressly to impose an assessment on the surface, and also on mines and quarries below the surface, and upon a number of items of real property, some of which read, as I have pointed out, like a repetition of the surface tax, all these items specified being followed by large general words, which must have been intended to sweep up any items of real property not enumerated which might have a taxable value, the general object being to make all such items of property contribute their quota to make up the requisite fund.

The plaintiffs, under their special Acts, which incorporate the Lands Clauses and Railways Clauses Consolidation Acts, have made a railway in an underground tunnel, under a street in the City of London, called the Crescent, Minories. They resist the claim for land tax, first, on the ground that they have only an easement, and secondly, that, even if they have more than an easement, their property is not liable to the tax.

As to the first question, it appears that by s. 5 of their special Act they are authorized "to enter upon, take, and use such of the lands delineated upon the deposited plans" as might be required for the purpose of their works, and by s. 16, "with respect to any lands which" they are by the Act "authorized to enter on, take, and use . . . . and which are under the roadway or footway of any street"; they "shall not be required wholly to take those lands, or any part of the surface thereof, or any cellar, vault, or other construction therein or thereunder"; but they "may appropriate and use the subsoil and under-surface of any such roadway or footway." That is, in simpler language, the company in such a case need not take the whole of the land, nor any part of the surface, nor any cellar under it, but they

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may "appropriate" the subsoil, &c. What does "appropriate" mean? I should suppose it means that they may take the subsoil as their own. Johnson's Dictionary gives, as one of the meanings of "appropriate," "to claim or exercise; to take to himself by an exclusive right," citing, "Why should people engross and appropriate the common benefit of fire, air, and water to themselves?" That quotation shews that the use of the word in this statute must have been in this sense: "Taking the subsoil to themselves by an exclusive right." What the company did was this: they excavated the ground and built underneath it a tunnel of massive brickwork, with walls four feet thick, of which they as a railway company have ever since had the exclusive possession and use.

An easement is defined in Gale on Easements, 6th ed. p. 6, referring to Termes de la Ley, as "a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged 'to suffer or not to do' something on his own land, for the advantage of the dominant owner."

Is this tunnel that sort of incorporeal right which is known as an easement or not? In *Hewlins* v. *Shippam* (1) the question was raised in respect of a drain, but was not decided. The pleadings stated a licence by a landlord to his tenant to construct at his own cost a drain from the demised tenement across a yard of the landlord. One of the questions discussed was as stated by Bayley, J., who delivered the judgment of the Court, "whether this was an interest in land, or an easement only." The grant was by parol, and, as the right claimed was a freehold right, it was held that it could not be created without deed. Bayley, J., however, said, at p. 229: "A right of way or a right of passage for water (where it does not create an interest in the land), is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. . . . Termes de la Ley, a book of great antiquity and accuracy, defines an easement to be a privilege that one neighbour hath of another by charter or prescription without profit, and it instances, 'as a way or sink through his land or

(1) 5 B. & C. 221.

such like.'" The distinction between an easement and an interest in land was pointed out in *Wood* v. *Lake* (1), *Taylor* v. *Waters* (2), and *Jones* v. *Flint.* (3) It appears, therefore, that a way or sink through a neighbour's land, where it does not involve an interest in the land, may be an easement. But a claim to construct and use for an unlimited period a drain through the land of another may amount to an interest in that land, and in such a case is more than an easement. In *Chelsea Waterworks Co.* v. *Bowley* (4), the Court of Queen's Bench held that the plaintiffs, who under the powers of their special Acts had laid down pipes from their waterworks through the streets in adjoining parishes, could not "be said to have or to hold any land or hereditament," but had only a right in the nature of an easement, and were, therefore, not liable to land tax in the parishes through which their pipes passed. Lord Campbell, C.J., said, at p. 360: "The mere power to lay the pipes in land cannot be considered land or hereditament; nor do we think that the pipes when laid can be so considered, within the meaning of the Land Tax Acts. The company are not the owners of the land where the pipes lie, nor are they the tenants of this land. . . . The moment the company take up their pipes which had been laid under the streets of any particular parish, all pretence for saying that they have or hold land in the parish would be gone; but, after the pipes are removed, all the land in the parish would remain, and it would be had and held as before." And he adds that "land" in the Land Tax Acts "means a legal interest in the soil."

But in *Reg.* v. *East London Waterworks Co.* (5) the defendants were held to be rateable by the Paving Commissioners in respect of land which they "occupied" by their pipes, which were laid under the soil, and Lord Campbell, C.J., in his judgment, at p. 716, thus distinguishes *Chelsea Waterworks Co.* v. *Bowley* (4): "We held that the company in that case were not liable to be rated to the land tax, because they had no interest in the land. Here the company have a direct interest in the land, and derive

(1) Say. 3; 13 M. & W. at p. 848, n.
(2) 7 Taunt. 374.
(3) 10 Ad. & E. 753.
(4) 17 Q. B. 358.
(5) 18 Q. B. 705.

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advantage from their works under the Act, and the situation of their pipes may be altered by the Commissioners; but they are the occupiers of the land in which the pipes are laid." I think this language can hardly convey the learned judge's meaning accurately. I do not suppose he intended to say that the defendants in the case then before him had such an interest in land as would make them liable to the land tax. If he did, it seems to me difficult to reconcile the two decisions. What I understand him to mean is, that, though not holders of any legal interest in land, they were occupiers of so much as their pipes displaced, and were rateable as occupiers by the Paving Commissioners. The word "occupy" is used in the Act which the Court were then considering, and this was relied on in argument.

It seems to me impossible to hold that a railway company authorized by their special Act to use the powers given by the Lands Clauses Consolidation Act in order to "appropriate" and "use" for all time the "subsoil" to the extent sufficient to make a brickwork tunnel large enough for two lines of ordinary railway, and who under those powers do remove the subsoil and build such a tunnel as I have mentioned, and occupy and use it exclusively for the purpose of their railway, can be said to have a mere easement. If the arched construction were made upon the surface, such a contention would be impossible. It is true that it does not interfere with the ordinary use of the surface as a street. But it is an exclusive appropriation of a material portion of the subsoil. And I think it is a freehold estate or interest in such part of the land as was so appropriated.

It was argued that s. 17 of the special Act refers to it as an easement, and that it was competent to the legislature to enact that it should be nothing more than an easement to all intents and purposes. My answer is that, assuming such a power in the legislature, if what it confers or enables the company to acquire is in fact a freehold estate in land, the words must be very express or explicit to give to such a property the incidents of an easement only. It is not enough to mention it as an easement in another section of the Act. Suppose the Act authorized the taking of a portion of the surface of the land for an estate in fee simple, and

then in another section mentioned this as an easement, it is impossible to say that such a mention would be sufficient to make the freehold estate so acquired an easement. It is difficult to see how it could be accomplished by express words. Even an Act of Parliament cannot make a freehold estate in land an easement, any more than it could make two plus two equal to five.

Then it was argued, secondly, that, even if this tunnel is more than an easement—assuming it to be an estate of freehold producing annual profit—still it ought not to be taxed. The surface is taxed, and to tax the subsoil would be to enforce a double tax on the same hereditament. When the surface was taxed, that tax covered all interests in the soil to the centre of the earth. Suppose the tax had been redeemed, could this tax upon the subsoil be imposed after the redemption? The answer to this ingenious argument is simple. The Act 38 Geo. 3, c. 5, does contemplate what in this argument is called a double tax. If mines were opened under land, the surface of which was taxed, the old value of the surface would not be diminished thereby; still those mines would be taxable in addition to the surface. If the words in the statute contemplating such a double taxation are large enough to include this tunnel, then the Act must be read as though the tunnel were mentioned, in the same way as mines are mentioned, for the purpose of subjecting it to the additional tax. Whether this could be done after the land tax on the surface had been redeemed depends upon the statutory provisions as to redemption; but, if they are so worded as to permit it, there would be no injustice in such a provision. If both the surface and mines being worked under it were in fact separately taxed, a redemption by the surface owner only ought not to affect the tax upon the mines. Therefore, when the surface owner redeemed before the mine was opened, it does not necessarily follow that it would be unjust afterwards to tax the mine.

No doubt a mine or a railway tunnel might be so made as to destroy the value of the surface, and a quarry might take away the surface altogether. This would be a reason for relieving the surface owner from his tax; but it affords a strong argument for taxing such a tunnel. Otherwise, the land in which the tunnel lies might escape tax altogether.

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For these reasons, I am of opinion that the company have an interest in land which is more than an easement, and that that interest is liable to be assessed to the land tax.

Appeal dismissed.

Solicitors: *Fowler, Perks, Hopkinson, & Co.; H. R. T. Alexander.*

W. L. C.

Dec. 3, 4.

QUARM *v.* QUARM AND ANOTHER.

Will—Construction—Gift of Freehold Estate to devisees "as joint tenants, and not as tenants in common, and to the survivor of them, his, or her heirs and assigns for ever"—Wills Act (1 *Vict. c.* 26), *s.* 28.

A testator devised a freehold estate to seven persons as "joint tenants, and not as tenants in common, and to the survivor of them, his, or her heirs and assigns for ever." The testator died after the coming into operation of the Wills Act (1 Vict. c. 26):—

Held, that the effect of the devise was to make the devisees joint tenants for life, with a contingent remainder in fee simple to the survivor.

APPEAL of the defendants from the judgment of the Kingsbridge County Court in a case remitted for trial from the Chancery Division. The action was brought by the plaintiff, Selina Quarm, to recover from the defendants possession of certain freehold houses in Kingsbridge in Devonshire. It appeared that John Quarm by his will, dated March 23, 1840, devised the premises to his wife for life, with remainder to his brother, George Quarm, for life, with remainder to Mary Quarm, Mary Anne Moysey, Martha Jane Quarm, George Quarm the younger, Herbert Quarm, Edward Quarm, and William Quarm, "as joint tenants, and not as tenants in common, and to the survivor or longest liver of them, his, or her heirs and assigns for ever." In 1843 the testator died. In 1889 George Quarm the younger was the only surviving joint tenant. He had been adjudicated a bankrupt in 1869, and in that year his estate and interest under the will of John Quarm had been conveyed by the official assignee, with his concurrence, to the plaintiff, Selina Quarm, for valuable consideration. The County Court judge held that the effect of the devise was to make the seven devisees joint tenants

for life, with a contingent remainder in fee to the ultimate survivor, George Quarm the younger, and that the plaintiff was therefore entitled, under the deed of 1869, to possession of the houses, with mesne profits from the date in 1889 at which George Quarm the younger became the only surviving joint tenant.

Channell, Q.C. (with him, *Hurrell*), for the defendants. The defendants are entitled to judgment. The effect of the limitation is to make the seven devisees joint tenants in fee. It is true that the interpretation put upon it is to some extent supported by *Vick* v. *Edwards* (1) and *Ex parte Harrison* (2), but the authority of these cases is disputed in Fearne on Contingent Remainders, 10th ed., pp. 356, 357, and they are decisions prior to the Wills Act. The effect of s. 28 of the Wills Act is, it is submitted, to make the gift to the seven joint tenants a gift of the fee, and the additional words are merely descriptive of the incident of survivorship which attaches to joint tenancy, and are therefore inoperative. The joint tenancy was severed and converted into a tenancy in common, to the destruction of the benefit of survivorship which would otherwise have accrued to George Quarm the younger, by his alienation of his share in 1869. The title of the plaintiff, therefore, dates from 1869, and in that case it is admitted that the defendants have a good title under the Statute of Limitations.

Bailhache (with him, *Bigham, Q.C.*), for the plaintiff. The construction put upon the will is supported by *Vick* v. *Edwards* (1) and *Ex parte Harrison* (2), and is in accordance with the evident intention of the testator. His object was to exclude the operation of the Wills Act. [He referred to Fearne on Contingent Remainders, 10th ed., pp. 356, 357; Butler's note to Coke upon Littleton, 191 a, 19th ed.; Challis on Real Property, p. 296; Theobald on Wills, p. 298.]

Channell, in reply.

LORD COLERIDGE, C.J. In this case we have to place a construction upon a clause in a will dated in 1840, shortly after the Wills Act came into operation, and evidently drawn by a lawyer.

(1) 3 P. Wms. 371. (2) 3 Anstr. 836.

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Lord Coleridge, C.J.

Sect. 28 of the Wills Act enacts "that when any real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." Therefore it is said unless a "contrary intention appears by the will" the effect must be to make the seven devisees joint tenants in fee; and in that case the joint tenancy in fee has been severed and put an end to owing to the conveyance of his share by one of the joint tenants. But it is urged on behalf of the plaintiff that when the whole clause is looked at, a "contrary intention" does appear—an intention, that is, to make these persons, not joint tenants in fee, but tenants for life, with a contingent remainder in fee simple to the ultimate survivor; and that this is shewn by the use of the words "and to the survivor or longest liver of them, his, or her heirs and assigns for ever"; and it was admitted on behalf of the defendants that, if this is not their true construction, these words must be regarded as not only inconsistent with the rest of the clause, but as useless. It is familiar law that effect should, if possible, be given to every word which the testator uses, and the interpretation suggested by the plaintiff does this. It gives effect to all the terms of the settlement, makes none of them nugatory, and places a plain and intelligible meaning on the words of the will. There is, therefore, good primâ facie reason for adopting it.

It may be well to cite two propositions which are laid down in Sir James Wigram's well-known "Examination of the Rules of Law respecting the admission of Extrinsic Evidence in aid of the Interpretation of Wills" (4th ed. pp. 15, 18). The first is, "A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed." The second, which also is important, is, "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself, in any other than their strict and

primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other." Using these canons, what is the "strict and primary" sense of the clause? Clearly it is that suggested on the part of the plaintiff, that the seven devisees are to be joint tenants for life, with a contingent remainder in fee simple to the last survivor of them. If, then, this "strict and primary" sense involves—as is the case here—no absurdity, and does not do violence to the context of the will, it is, Sir James Wigram says, to be adopted under an inflexible rule of construction. It is said, however, that owing to the operation of the Wills Act, the creation of the joint tenancy must be taken to have exhausted the power of the testator, because by s. 28 a devise without words of limitation is to pass the fee simple. The authority of a statute is indisputable, and this might have been the case if this were all that the section enacted. But, as if to meet this very case, it adds "unless a contrary intention appears." I think that we are bound, therefore, to give effect to every part of the limitation. Then is there not something in the choice of the words which shews that very "contrary intention" —the intention, that is, that the language is to have its own technical effect, and that which has been attributed to it by judges of authority, and not that effect which, in the absence of a "contrary intention," the statute prescribes for it? If so, this is the meaning of the words of the testator; and it has been truly said that in interpreting a will it is the meaning of his words, and not his intention, which has to be ascertained.

I think, therefore, that, though perhaps nothing is absolutely certain, it is clear that, according to the recognised rules for the construction of wills, the contention of the plaintiff is correct. It is almost admitted that it would have been correct before the passing of the Wills Act, as is indeed shewn by *Vick* v. *Edwards* (1), *Ex parte Harrison* (2), and a passage in Burton's Compendium (3), and I think that it is still correct. There is no doubt a difficulty as to the precise position of the fee during

(1) 3 P. Wms. 371. (2) 3 Anstr. 836.
(3) 8th ed. p. 245.

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the continuance of the life tenancy. I should suppose, though I do not assert, that it was in the devisor. But as regards the construction of the will and the effect of the Wills Act, I think that the judgment appealed from is right, and that the appeal must therefore be dismissed.

WRIGHT, J. As I now understand the argument, it is admitted that the appeal must fail if the effect of the gift to the devisees as joint tenants and to the survivor or longest liver of them, his or her heirs and assigns for ever, was to give the ultimate survivor of the joint devisees, not the mere benefit of survivorship incident to a joint estate, but a separate estate in remainder after joint life estates. It is also, I think, admitted—and at any rate the authorities appear to me to establish—that before the Wills Act the proper construction of this special form of devise was that it did give to the survivor such an estate in remainder. This is clearly taken for granted in *Ex parte Harrison* (1), as well as in *Vick* v. *Edwards* (2), and there is nothing improbable or unreasonable in supposing an intention to keep the property together for the benefit of the ultimate survivor, instead of leaving it subject to partition and dissipation by any one of many possible events during the joint lives.

But it is argued that the ground of the earlier decisions has been destroyed by the Wills Act, and that a will in this form made since the Wills Act ought to be differently construed; and the case is put in this way. Before the Wills Act a devise to two or more jointly without any mention of heirs gave a joint estate for lives only; and it is said that it was this which obliged the Courts to come to the conclusion that in a devise to two or more jointly, and to the survivor of them and his heirs, the only disposition of the fee was the disposition to the contingent survivor and his heirs; a conclusion which was objectionable and anomalous on general grounds as leaving it uncertain where the fee was during the joint lives, whether in the donor's heirs or in the tenants. By virtue of the Wills Act (1 Vict. c. 26), s. 28, a devise to two or more jointly without any words of limitation now gives a joint estate in fee, unless a contrary

(1) 3 Anstr. 836. (2) 3 P. Wms. 371.

intention appears by the will; and the argument is, firstly, that there is under the devise now in question a gift of a joint fee which ought not to be cut down by the subsequent reference to the survivor and his heirs, which reference is sufficiently explained as an unnecessary and inoperative statement of the legal effect of the gift of the joint fee; and, secondly, that the inconvenient and anomalous construction which was formerly forced on the Courts ought not to be adopted now that the necessity for adopting it has ceased.

I am not satisfied that the ground of the earlier decisions was as suggested. If it had been the true ground, the difficulty would have been most easily solved by adopting the very construction for which Mr. Channell now contends; but that solution was rejected. The real ground appears to me to be that the proper form of a joint gift in fee was a gift to the persons named and their heirs, and that an express designation of the heirs of one alone of them prevented the construction of the gift as a joint fee; and this reasoning is still applicable. And even if the ground of the earlier decisions was as suggested, I do not think that it is in the case of this devise affected by the Wills Act, because I think that in this case an intention does appear by the will contrary to the construction which is otherwise made primâ facie proper by s. 28 of the Wills Act; and consequently the same reason exists now as existed before 1887 for adopting the plaintiff's contention, namely, that there appearing an intention not to give a joint fee, and yet an intention to dispose of the fee, the gift is ineffectual unless construed as a gift of the fee in remainder to the survivor.

Judgment for the plaintiff.

Solicitors for plaintiff: *Downing, Holman, & Co., for Downing & Handcock, Newport, Monmouthshire.*

Solicitors for defendants: *Hurrell & Mayo, for J. S. Hurrell, Kingsbridge, South Devon.*

H. D. W.

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Dec. 7, 16.

THE QUEEN *v.* THE LONDON COUNTY COUNCIL. Ex parte AKKERSDYK. Ex parte FERMENIA.

Local Government—County Council—Music and Dancing Licence—Hearing of Application—Judicial Proceedings — Duty of Council — Appearance by Member of Council in Opposition to Application—Invalidity of Proceedings.

The county council in determining applications for music and dancing licences are acting judicially, and are bound by the same principles as are binding on justices in determining questions which come before them for judicial decision.

The London County Council delegated to a committee of their body the hearing of applications for music and dancing licences. The committee by a majority recommended that a licence which had been applied for should not be granted. The applicant thereupon applied to the county council for a licence. At the hearing before the county council certain members of that body, who were also members of the committee and had voted in the majority against granting a licence at the hearing before the committee, instructed counsel to represent them before the county council and oppose the application for a licence. The councillors so instructing counsel were present at the hearing, but did not vote. The council by a majority refused the application for a licence:—

Held, that the presence at the hearing of those members of the county council who had instructed counsel to oppose the application vitiated the proceedings, and a rule for a mandamus to hear and determine the application according to law was accordingly made absolute.

A RULE nisi had been granted, on the application of John Akkersdyk, calling upon the London County Council to shew cause why a writ of mandamus should not issue commanding the council to hear and determine according to law the application of Akkersdyk for a licence for music and dancing in respect of his premises, the Angel and Crown public-house.

A similar rule had been granted on the application of Fermenia, the landlord of a public-house called the Rose and Crown, and the two cases were heard together.

In each of the two cases a rule nisi had also been obtained for a certiorari to bring up and quash the resolution of the council refusing the licence; but on the argument these rules were by consent abandoned without costs.

From the affidavits used on the argument, it appeared that the London County Council had delegated the duty of hearing

applications for licences for music and dancing to a committee of the council. (1) This committee sat at the Clerkenwell Sessions House, and on October 1, 1891, Akkersdyk and Fermenia applied to the committee for licences for music and dancing in respect of their premises, which had previously been licensed for those purposes.

Certain evidence was given before the committee, and in each case a majority of the committee voted against granting the licence, which was accordingly refused, the applicant being informed that he would be at liberty to apply to the council.

On October 23, the London County Council sat at Spring Gardens, and the two applicants appeared before them by counsel and renewed their applications for licences for music and dancing.

It then appeared that four members of the London County Council, all of whom were also members of the committee, and had voted with the majority of the committee against the applications for licences, and three of whom were present at the meeting of the council, were represented before the council by a barrister, instructed by a solicitor, who opposed the granting of the licences. Ultimately, the council by a majority resolved to refuse both licences. None of the members who were represented by counsel voted on the division.

The above is an outline of the facts, which are more fully stated in the judgment of the Court.

Dec. 7. *Poland, Q.C.*, and *Avory*, for the London County Council, shewed cause against the two rules for mandamus. The members of the council acted within their rights, and the resolutions refusing the licences are valid. It must be conceded that, if a similar state of facts had occurred with regard to justices sitting in quarter sessions, the proceedings would have been invalid; but the distinction in the present case is that the

(1) Licences for music and dancing are regulated by 25 Geo. 2, c. 36, ss. 2, 3, and the powers and duties formerly conferred and imposed on justices in respect of such licences are transferred to the London County Council, and the powers and duties of the Council are defined and regulated by the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41), which are referred to in the judgment.

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county council were acting in the performance of administrative, not judicial, duties. The council is a body which is elected, and candidates are entitled to stand as advocating particular views and opinions, and when elected are entitled to uphold those views and opinions. Moreover, in both cases, the facts shew a waiver on the part of the applicants of any right to object which they might otherwise have had.

Finlay, Q.C. (*Grain*, with him), in support of the rules. The county council were acting judicially, and they are bound to adhere to the rules which have from time to time been laid down by the Courts for the guidance of justices. There can be no question that the presence of an interested justice, with the other members of the Court, at any judicial hearing, will vitiate the proceedings, notwithstanding the fact that the interested justice does not take any part in the actual decision; and the same rule applies with regard to members of the county council in such a case as the present. There was no evidence of waiver in either of the two cases.

[The following authorities were referred to: *Reg.* v. *Cheltenham Commissioners* (1); *Dimes* v. *Proprietors of the Grand Junction Canal* (2); *Reg.* v. *O'Grady* (3); *Ex parte La Mert* (4); *Reg.* v. *Allan* (5); *Wakefield Local Board of Health* v. *West Riding and Grimsby Railway Company* (6); *Reg.* v. *Meyer* (7); *Reg.* v. *Milledge* (8); *Reg.* v. *Justices of Kent* (9); *Reg.* v. *Handsley* (10); *Reg.* v. *Justices of Great Yarmouth* (11); *Ex parte Partridge* (12); *Reg.* v. *Farrant* (13); *Reg.* v. *Justices of Cumberland* (14); *Allbutt* v. *General Council of Medical Education and Registration* (15); *Leeson* v. *General Council of Medical Education and Registration.* (16)]

Cur. adv. vult.

(1) 1 Q. B. 467.
(2) 3 H. L. C. 759.
(3) 7 Cox C. C. 247.
(4) 4 B. & S. 582.
(5) 4 B. & S. 915.
(6) Law Rep. 1 Q. B. 84; 6 B. & S. 794.
(7) 1 Q. B. D. 173.
(8) 4 Q. B. D. 332.
(9) 44 J. P. 298.
(10) 8 Q. B. D. 383.
(11) 8 Q. B. D. 525.
(12) 19 Q. B. D. 467.
(13) 20 Q. B. D. 58.
(14) 58 L. T. (N.S.) 491.
(15) 23 Q. B. D. 400.
(16) 43 Ch. D. 366.

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Dec. 16. The judgment of the Court (Lord Coleridge, C.J., and A. L. Smith, J.) was delivered by

A. L. SMITH, J. In this case John Akkersdyk obtained a rule nisi calling upon the London County Council to shew cause why a writ of mandamus should not issue commanding the council to hear and determine his application for a licence for music and dancing in respect of his premises, the Angel and Crown public-house, in the Liberty of the Tower, and also why a writ of certiorari should not issue to bring up a resolution of the council refusing such licence.

The real question we have to determine is, whether the London County Council have heard and determined Akkersdyk's application according to law; if yes, then the rule must be discharged; aliter if they have not.

For many years prior to the passing of the Local Government Act, 1888 (51 & 52 Vict. c. 41), which created county councils, Akkersdyk had applied for and obtained from the county justices sitting in quarter sessions a music and dancing licence for his premises.

By this Act (s. 3) the administrative business of the justices of the county in quarter sessions assembled, in respect of the licensing of houses for music and dancing, was transferred to the county council.

The council were not authorized to administer an oath, or to perform any judicial business, or otherwise act as justices of the peace (s. 78).

By s. 28 the council had power to delegate to a committee, with or without restrictions or conditions, any powers or duties transferred to them.

After this Act was passed the county council continued to grant what are known as renewals of the licence to Akkersdyk, and upon the last occasion upon which such grant was made structural and other alterations were required by the council to be executed by him to the amount of 1000*l.*, he being at the same time informed that the execution of such works would not give him any right to a subsequent renewal.

Akkersdyk executed the works according to the requisition of the architect of the council.

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In the succeeding year—viz., on October 1, 1891—Akkersdyk again applied to the licensing committee of the county council, sitting at the Sessions House, Clerkenwell, for a renewal of his licence. After some evidence had been heard, Akkersdyk was informed by the chairman that the majority of the committee were not satisfied as to the house, and that they could not recommend the council to grant the renewal, and that it was open to him to appeal to the London County Council, who would sit on October 23, 1891.

Akkersdyk, in these circumstances, appeared by counsel before the London County Council sitting in licensing sessions at Spring Gardens.

It is erroneous to say that this was an appeal. It was no such thing. It was an original hearing by the London County Council of the applicant's application for what is called a renewal of the music and dancing licence, the council having before them the report of their committee of what they had done at Clerkenwell.

Akkersdyk, by his counsel, protested against the decision of the committee, and insisted that nothing had been proved against him disentitling him to a renewal of the licence.

At this time Mr. MacDougall, Mr. Beachcroft, and Mr. Leon, three of the committee who had voted against Akkersdyk at Clerkenwell, were sitting upon the London County Council adjudicating upon his case, Mr. MacDougall taking a somewhat active part in the discussion thereon.

It then, for the first time, appeared that these three councillors were not only adjudicating upon the applicant's case, but had themselves, together with another of the committee who had voted against the applicant—viz., Mr. Lidgett—retained counsel and solicitor to appear before the council to press the case against him, and uphold if they could the vote the four councillors had given when upon the committee at Clerkenwell.

Hence the present rule nisi for a mandamus to hear and determine the applicant's application according to law.

Mr. Poland very frankly admitted that, if what had taken place in this case had taken place when justices were sitting in quarter sessions, he could not have resisted the mandamus.

He admitted, and it has been so held, that the presence of one interested justice would render the Court improperly constituted and vitiate the proceedings, it being no answer to the objection that there was a majority in favour of the decision without reckoning the vote of the interested party: *Reg.* v. *Justices of Hertfordshire* (1); but Mr. Poland argued that the London County Council were an elected body, and not justices sitting in quarter sessions; and in this we agree.

It is true that, by the statute 25 Geo. 2, c. 36, justices, and now, by the Local Government Act, 1888, the county council, are authorized to grant or refuse a licence as they "in their discretion shall think proper"; but the discretion is to be exercised, as Lord Halsbury puts it in *Sharp* v. *Wakefield* (2), "according to the rules of reason and justice."

In our judgment, the London County Council are adjudicating as to whether a man is or is not to be deprived of his licence; to use the words of Cotton, L.J., in *Leeson* v. *General Council of Medical Education* (3), "Though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded." In our judgment, when so acting, they are not emancipated from the ordinary principles upon which justice is administered in this kingdom, and which are, as it has been said, founded on its very essence. It is conceded by Mr. Poland that, if the London County Council adjudicated in a matter of a music and dancing licence against an applicant without hearing him, such an adjudication could not stand. He also admitted that, if any of the council adjudicating had a pecuniary interest in the subject-matter, such adjudication also could not stand. Then why is an adjudication in which gentlemen have acted both as judges and accusers at the same time to be upheld? There is a sequence of authority holding that it cannot be, and it suffices to quote a passage from the judgment of Cotton, L.J., in the case above named, in which he says: "Of course the rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where

(1) 6 Q. B. 753. (2) [1891] A. C. at p. 179.
(3) 43 Ch. D. at p. 379.

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he brings forward the accusation or complaint on which the order is made." (1) And yet this is precisely what, in the present case, the three councillors have done. But it was argued, that after it had appeared that they were, in fact, both accusers and judges, they no longer took part in the deliberations of the council.

This, however, will not avail, even if it were the fact; for Lord Denman, in the case above cited, *Reg.* v. *Justices of Hertfordshire* (2), held, that a decision was vitiated by any one interested person taking part, it being enough for the purpose that one single interested person has formed *part* of the Court, and Patteson, J., who followed Lord Denman, said, "The question is, has an interested person taken *any part at all*?"

The case of *Reg.* v. *Meyer* (3) is also an authority as to this; Blackburn, J., in delivering judgment, said: "We cannot go into the question whether the interested justice took no part in the matter (i.e., in the discussion of the case). The question is, was he so interested in the matter as that he ought not to have sat?" In this we agree.

Then a further point was taken for the London County Council, viz., that the appellant had waived any objection to the three councillors sitting upon his case, and authorities were cited to shew that if there was such a waiver, mandamus would not go. We do not doubt the authorities; but we are clear that there was no waiver in fact in this case. It is true that when Akkersdyk arrived at the council in Spring Gardens he might, and probably did, see the three councillors he had previously seen sitting upon the committee; but neither he nor his solicitor then knew anything of counsel being present upon their retainer to press the case against him. In our judgment, the London County Council shew no good cause against this rule, and mandamus must go to them to hear and determine Akkersdyk's application according to law. We understand that in this and the subsequent case, about which hereafter, counsel consent to the rules for a certiorari being abandoned without costs.

In the case of *Fermenia* v. *The London County Council* the salient facts are almost identical with those in the case of

(1) 43 Ch. D. at p. 379. (2) 6 Q. B. 753.
(3) 1 Q. B. D. 173.

Akkersdyk, with the exception that Fermenia had spent 1135*l.* upon alterations according to the requirements of the architect of the London County Council, and that the evidence adduced before the committee was altogether in his favour.

The decision of the committee was as follows:—

"The decision of the committee is the same in this case as it was in the last" (i.e., Akkersdyk's). "They do not recommend the council to grant a renewal. It will be open to you to appeal to the council on October 23." This case came on before the council immediately after Akkersdyk's, and was in reality a continuation of it. The learned counsel for the four councillors pressed the case against Fermenia as he had done against Akkersdyk, and with the same result. It was argued in this case that the three councillors "had left the Bench"—a term well known in the administration of justice—and consequently they were no longer judges as well as accusers. It is true, as appears from the shorthand writer's notes, that none of the three councillors took any open active part in the discussion of this case, as Mr. MacDougall had done in Akkersdyk's case. It was sworn, however, by Henry Souch, clerk to the applicant's solicitor, that on several occasions whilst the case was proceeding, he saw Mr. MacDougall, Mr. Beachcroft, and Mr. Leon, standing or sitting in the council chamber, and upon one of such occasions he saw Mr. Leon sitting immediately behind the official seat of Mr. Fardell, the chairman of the licensing committee, and conversing with other members of the London County Council.

Mr. Leon, in his affidavit in answer, does not deny being in the council chamber, but states that during the discussion he was not in that part of the chamber in which councillors who are taking part in the proceedings sit.

He admits that he may have conversed occasionally with other members who came and spoke to him there. He does not, however, state what they spoke about; but he adds that he did not attempt to influence their votes.

Mr. Beachcroft limits his attendance in the council chamber to one or other of the doorways, and Mr. MacDougall states that he sat on the daïs behind the seat of the chairman, which is the

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place for visitors, and not where councillors who are taking part in the proceedings sit.

In the affidavit of Mr. MacDougall, handed up to us, as originally drafted for him to swear, it stated: "I may have conversed occasionally with the members who came and spoke to me there; but I did not attempt to influence their votes, and I left the council chamber before, and was not present during, the shew of hands."

This paragraph is struck out before Mr. MacDougall swore to the affidavit, and it is deposed to with this paragraph erased.

It should be noticed that it appears from the shorthand notes that Mr. Ford, who addressed the council, considered that the three councillors were still taking part in the proceedings.

In our judgment, if members of a body such as the London County Council, consisting as it does of 139 persons, and sitting in a building like that at Spring Gardens, desire to retain counsel on their behalf to press accusations against applicants for licences, or others, before the council, they should either absent themselves altogether from the precincts of the building, or sit in such a position, with their counsel, that it may be known to all as to who the real accusers are, and that they do not "leave the bench" if they remain in the position the three councillors did upon this occasion.

In our judgment, these two cases, conducted as they have been throughout, are in reality one, the one case being referred to in the other, and what we have said about waiver in Akkersdyk's case is applicable to this case: see *Reg.* v. *Great Yarmouth.* (1)

A mandamus must also go in this case, as in Akkersdyk's, to hear and determine Fermenia's application according to law.

Rules absolute.

Solicitors for applicants: *H. J. & C. Child.*

Solicitor for London County Council: *W. A. Blaxland.*

(1) 8 Q. B. D. 525.

P. B. H.

LORD *v.* FOX. 1891 Nov. 10.

Parliament—Registration—Borough Vote—Household Qualification—Qualification as Burgess—Powers of Revising Barrister—Effect of Declaration—Necessity for Claim—Registration Act, 1843 (6 *Vict. c.* 18), *ss.* 15, 38—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 24, *s.* 28 *sub-ss.* 1, 12, 13, 15.

A person whose name had been placed by the overseers in Division Three of the occupiers' list for a borough, as entitled to be enrolled as a burgess but not to be registered as a parliamentary elector, was objected to in that division. He had not claimed in the manner required by s. 38 of the Parliamentary Registration Act, 1843, as being entitled to both the parliamentary and the municipal franchise, but had subscribed a declaration pursuant to s. 24 of the Parliamentary and Municipal Registration Act, 1878, in which he stated that he possessed a qualification for the two franchises. The revising barrister acted upon the statements contained in the declaration, and transferred the name from Division Three to Division One:—

Held, that the revising barrister had under the circumstances no power to transfer the name, as by so doing he changed the description of the qualification of the voter in a manner inconsistent with sub-s. 13 of s. 28 of the Parliamentary and Municipal Registration Act, 1878.

CASE stated by the revising barrister for the borough of Burnley.

The name of Richard Sagar was placed by the overseers in Division Three of the occupiers' list for the borough as a person entitled to be enrolled as a burgess, but not entitled to be registered as a parliamentary elector. It appeared that he had not made a claim to be registered as a parliamentary elector and burgess pursuant to s. 15 of the Registration Act, 1843 (1), but had subscribed, pursuant to s. 24 of the Parliamentary and Municipal Registration Act, 1878, a declaration as follows:— (2)

"I am the person referred to in Division Three of the list, &c., by an entry as follows:—

Name as described in List.	Place of Abode as described in List.	Nature of Qualification as described in List.	Description of Qualifying Property.
Sagar, Richard	8 Thomas Street	House, joint	8 Thomas Street.

(1) See Form H. No. 1 in Appendix 2 to Registration Order, 1889.

(2) See Form M. in Appendix 2 to Registration Order, 1889.

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"My correct name and place of abode, and the correct particulars respecting my qualification, are and ought to be stated for the purposes of the register of parliamentary electors for the parliamentary borough of Burnley and the burgess roll for the municipal borough of Burnley about to be made, as follows:—

	Correct Name.	Correct Place of Abode.	Correct Nature of Qualification.	Correct Description of Qualifying Property.
Division One.	Sagar, Richard	8 Thomas Street	House	8 Thomas Street.

The revising barrister, acting upon the statements contained in the declaration, transferred the name from Division Three to Division One. The appellant, who had objected to the name being inserted in Division Three, contended that the revising barrister had not under the circumstances power to transfer it from Division Three to Division One.

J. V. Austin, for the appellant. The revising barrister was wrong. His power to insert a name which has been omitted by the overseers in a list of voters for a parliamentary borough depends upon s. 38 of the Parliamentary Registration Act, 1843, and can only be exercised where a claim has been made by the person whose name has been omitted at the time and in the manner prescribed by s. 15, and subject, therefore, to objection in Court under the provisions of s. 39 of that Act. It cannot be intended that the declaration to correct a misdescription in the list, which is permitted by s. 24 of the Parliamentary and Municipal Registration Act, 1878, and which that section renders "evidence of the facts declared to," may be substituted, if the person omitted so chooses, for the claim subject to objection which the earlier statute makes a condition precedent to his right to the parliamentary franchise; and the case does not fall within the powers of a revising barrister as defined by s. 28. It was not a case of a "mistake in a list" within sub-s. 1, or of "a matter stated in a list insufficient in law to constitute a qualification of the nature or description stated" within sub-s. 12, or of placing names in appropriate divisions within sub-s. 15. What has been done is to change the description of a qualification

contrary to sub-s. 13, by adding to a municipal a parliamentary qualification.

[He referred to *Greenway* v. *Bachelor*, *Jacobs' Case* (1); *Ford* v. *Hoar* (2); *Foskett* v. *Kauffman*. (3)]

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. This objection is of the very finest kind. If all the ingredients of a qualification for Division One appear in a declaration made by a voter who has been placed by the overseers in Division Three, and it is clear that, had he made a claim, he would have been entitled to be placed by the revising barrister in Division One, it undoubtedly seems hard that he should not succeed. But the matter is one of parliamentary enactment, not of common law or of equity, but of the reasonable construction of statutes; and if what the revising barrister has done cannot be justified, the voter must suffer.

The voter might have prevented his misfortune by claiming, but he did not do so. Had he claimed to be placed in Division One, and had his claim been objected to, the objector would then have had a right to be heard before the revising barrister. What the voter has done is to allow his name to remain in Division Three of the list, with a qualification abundantly sufficient to entitle him to be placed in that division, and at the same time to apply to the revising barrister to be placed in Division One in such a manner as to deprive any voter of the power of objecting to his being placed in that division. Under these circumstances, was it within the power of the revising barrister to place him in Division One? I cannot think that it was. His power is limited by sub-s. 13 of s. 28 of the Parliamentary and Municipal Registration Act, 1878, which says: "Nor shall the revising barrister be at liberty to change the description of the qualification as it appears in any list, except for the purpose of more clearly and accurately defining the same." Here the revising barrister changed the description of the qualification by making it applicable to a list to which it did not apply, and attached to which it did not stand.

(1) 12 Q. B. D. 376. (2) 14 Q. B. D. 507.
(3) 16 Q. B. D. 279.

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The general words of sub-s. 1 must be read subject to those of the other sub-sections of s. 28. It is true that sub-s. 1 says, "he shall correct any mistake which is proved to have been made in any list;" but, having regard to the words of sub-s. 13, it is plain that the effect of sub-s. 1 cannot be to enable the revising barrister to transfer a name from one division of the list to another division for which a different qualification is requisite, and in respect of which there has not been a claim.

The words of the statute have, therefore, not been complied with, and the same is true of its substance; for the effect of what has been done is to deprive any person who might wish to object of the power of doing so. The decision of the revising barrister must therefore be reversed, and the name expunged.

WRIGHT, J. I am of the same opinion. Sub-s. 13 of s. 28 of the Parliamentary and Municipal Registration Act, 1878, expressly prohibits the revising barrister from "changing the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." Here the revising barrister changed the description of the qualification for another purpose, that of transferring a name from Division Three to Division One. This he had no power to do. He acted with great doubt, and very properly stated this case.

COLLINS, J., concurred.

Solicitors for the appellant: *Robinson, Preston, & Stow, for Waddington, Burnley.*

H. D. W.

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Parliament—Registration—Lodger Qualification—Claim of Lodger—Attestation of Claim of Lodger—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 30, *sub-s.* 2—*Registration Order*, 1889, *Appendix* 2, *Form H, No.* 2.

The claim of a lodger to be registered as a parliamentary elector under the Registration of Electors Acts is invalid if the attesting witness is not present when such claim is signed.

CASE stated by the revising barrister for the borough of St. Pancras.

The names of the appellants were on the old lodgers' list of parliamentary voters for the borough. They were respectively objected to on the ground that their claims had not been "legally attested."

The attestations were in the form prescribed by the Registration Order, 1889, viz.: "I the undersigned hereby declare that I have witnessed the above signature of the above-named claimant at the date stated above, and that I believe the above claim to be correct," with the signature of the witness and a date attached. (1) In the case of the appellants, Body and Fenning,

(1) Form H., No. 2, in Appendix 2 to Registration Order, 1889.

"To the overseers of the parish (or township) of

"I claim to have my name inserted as a lodger among the parliamentary electors for the borough of in respect of the qualification named below.

Name of Claimant in full.	Description of Rooms occupied, and whether furnished or not.	Street, Lane, or other Place and Number (if any) of House in which Lodgings situate.	Amount of Rent paid.	Name and Address of Landlord or other Person to whom Rent is paid.
Stevens, John William	Two rooms, first floor, furnished.	51 Brick Street	16*s.* a week.	William Johnson, 51 Brick Street.

"I hereby declare that I have during the twelve calendar months immediately preceding the 15th day of July, in the year , occupied as sole tenant (or as joint tenant with), and resided in the above-mentioned lodgings, and that those lodgings are of a clear yearly value, if let unfurnished, of ten (or

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the signature of the witness was dated the same day as the date of the claim; in that of the appellant Hunt, the day after the date of the claim.

It was proved in support of the objection in Body's case that the witness was not present when Body signed the claim, but attested it on the same day at his request; in Hunt's case, that the witness was not present when Hunt signed the claim, but attested it the day afterwards at Hunt's request; in Fenning's case, that the witness was not present when Fenning signed the claim, but attested it on the same day at the request of Fenning's wife without having communicated with Fenning. It was admitted in each case that the witnesses knew the claimants personally, and were cognizant of the facts declared to in their claims.

The revising barrister held that the claims were invalid, and expunged from the list the names of the appellants and those of thirty-four other persons whose claims appeared to have been similarly attested.

Asquith, Q.C. (with him, *Roskill*), for the appellants. The revising barrister was wrong. The presence of the attesting witnesses at the time when the claims were signed was not necessary to satisfy s. 30, sub-s. 2, of the Representation of the People Act, 1867. Sect. 5 of the Statute of Frauds provided that a will of lands was "to be attested and subscribed" by witnesses "in the presence of the devisor," but it was held to be unnecessary under that section that the witnesses should see the testator sign the will, if he acknowledged the signature to

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twenty) pounds or upwards, and I hereby declare that I am on the register of parliamentary electors for the said parliamentary borough, in respect of the same lodgings as above mentioned, and I desire to have my name inserted in the old lodgers' list.

"Dated the day of 18

"(Signed) A. B. (the claimant.)

"I, the undersigned, hereby declare that I have witnessed the above signature of the above-named (here state name of claimant) at the date stated above, and that I believe the above claim to be correct.

"Dated the day of 18

"(Signed) C. D. of

"(State residence and calling of witness)."

them, as the claimants are here shewn to have done: see per Lord Hardwicke in *Grayson* v. *Atkinson* (1), and per Tindal, C.J., in *White* v. *Trustees of British Museum.* (2) There is nothing either in the terms of the section or in those of the statutory form, which itself contains two dates, to shew that a claim to be placed on the old lodgers' list need be attested at the same time that it is signed. The object of the statute in requiring attestation is to secure evidence of the identity of the claimant and of the genuineness of his qualification. This evidence is supplied in each of these cases, and by s. 18 of the Registration Act, 1888, a "disregard of any form" is not "of itself" to "invalidate" a proceeding in registration.

R. M. Bray, and *Daniel Warde*, for the respondent, were not heard.

LORD COLERIDGE, C.J. I am of opinion that the revising barrister was right. The ground of our decision is no doubt narrow and technical, as was said in the House of Lords in *Hindmarsh* v. *Charlton* (3) with reference to a judgment of the House in a case of defective attestation under the Wills Act; but we are bound by the statutes.

The three cases present slight differences of fact, and, for a reason which will appear, I will deal first with the second and third. In the second case the appellant signed and dated the claim in the absence of the witness, and took it to the witness the next day, and acknowledged his signature to him, and the witness signed the attestation on that day. The attestation clause says: "I hereby declare that I have witnessed the above signature of the above-named claimant at the date stated above." "The date stated above" was the day before, and it is admitted that the witness did not attest the claim on that day; yet he says that he did so. Clearly this is not sufficient; and the case affords a strong and cogent argument for holding that signature and attestation are to be contemporaneous acts.

In the third case the claim was taken to the witness on the same day that the appellant signed it, and was signed by the

(1) 2 Ves. Sen. 454. (2) 6 Bing. 310.
(3) 8 H. L. C. 160

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witness on that day. It was taken to him, not by the appellant, but by his wife, as it might have been by any other person. Nothing passed between the appellant and the witness: the appellant's wife simply told the witness that she had seen her husband sign it. It is impossible to maintain that this, any more than that in the second case, is a good attestation. The witness did not see the appellant sign the claim, nor was there anything equivalent to a statement to the witness by the appellant that the claim was his. There was no acknowledgment of the signature of the claimant of the kind suggested in the case before Lord Hardwicke, and in the existing Wills Act, with reference to the signature of a testator.

If, then, it has to be admitted, as it clearly must be, that in the second and third cases the attestation is defective, see what a light this throws upon the first case—that which was more seriously argued. In that case it is true that the attestation and the claim were signed on the same day, and there was something like an acknowledgment of his signature by the claimant to the witness. But is it enough that the date of the signature of the witness should be the same day as the date of the claim? One of my learned brothers suggested that, if the claimant had for greater caution added the hour and the minute at which he signed, "the date stated above" would mean not only that day, but that hour and that minute. Does not the illustration shew that the effect of the words "that I have witnessed the signature at the date stated above" is to require that the claim and the attestation shall be contemporaneous? The date is the moment at which the claim is signed. "I have witnessed," in popular language, means "I have seen"; a "witness to a transaction" means an eye-witness of what has occurred.

This would be my view if the statute stood alone; but it does not stand alone. The decision in *Hindmarsh* v. *Charlton* (1) is of the highest authority, and, though given by the House of Lords with great reluctance, it is a very clear decision. The question was as to compliance with s. 9 of the present Wills Act (1 Vict. c. 26), which enacts: "That no will shall be valid unless it shall be in writing and executed in manner hereinafter men-

(1) 8 H. L. C. 160.

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tioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." The testator acknowledged his signature to the will in the morning in the presence of the first witness, and that witness then, in the presence of the testator, subscribed the will with his signature in full. The second w ıess was not then present. In the afternoon the second witness was brought in, and the testator then, in his presence and in that of the first witness, acknowledged his signature to the will. The second witness then subscribed the will in the presence of the testator and of the first witness, and at the same time the first witness acknowledged the signature which he had subscribed in the morning, and added some little mark to it. The House of Lords held with reluctance, but without hesitation, that there had not been a sufficient attestation of the will by the witnesses; that it mattered not that the first witness had acknowledged and slightly added to his signature in the presence of the second witness; nevertheless, there had not been a signature by the first witness after the testator had acknowledged his signature in the presence of both witnesses, as the Act required. They held in effect that, in order to satisfy its words there must be a signature by two witnesses who had contemporaneously witnessed the signature or acknowledgment by the testator, and that this was not the case, even though at the time when the second witness signed there was an acknowledgment of the signature of the first. This case shews strongly that, if the tribunal had had to consider the words of this attestation clause, they would have held that what has here been done was not in compliance with them.

The matter is one of positive and specific enactment, and a Court has no right to strain the law because it causes hardship. Revision Courts take place year by year. Revising barristers and agents will now know that attestations of this irregular kind have been pronounced insufficient, an more care will be taken in future.

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WRIGHT, J. I am of the same opinion. The words of the form are plain words used in a popular sense. It is to be remembered that a claim to be placed on the old lodgers' list can only be sent in after July 15 and before July 26. The legislature requires proof of two things, the identity of the claimant, and the fact that his claim was made between these dates. These attestations might, perhaps, prove the former, but they could not possibly prove the latter, fact.

COLLINS, J., concurred.

Solicitor for appellants: *Rexworthy.*
Solicitors for respondent: *Halse, Trustram & Co.*

H. D. W.

Nov. 10.

HALL *v.* METCALFE.

Parliament—Registration—Borough Vote—Borough Occupation Franchise—Occupiers of Stands in Market—Reform Act, 1832 (2 & 3 *Wm.* 4, *c.* 45), *s.* 27—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *ss.* 5, 7 *sub-s.* 7, *s.* 12.]

The lessee of a market in a parliamentary borough sub-let the area to occupiers of stands at annual payments of more than 10*l.* The spaces occupied were not marked or enclosed, but the precise position of each space was known to the lessee, the occupier, and the occupiers of the other stands:—

Held, that the occupiers were entitled to the borough occupation franchise under s. 5 of the Representation of the People Act, 1884.

CASE stated by the revising barrister for the borough of the Tower Hamlets.

The appellant objected to the names of Charles Allen and Jabez Charles Abbot being retained on the occupiers' list for the borough as qualified for the parliamentary franchise in respect of stands in Spitalfields Market, on the ground that neither had continuously occupied as tenant for twelve months previous to July 15 the alleged qualifying premises, and that neither occupied "any land or tenement" within the meaning of s. 5 of the Representation of the People Act, 1884.

The case contained the following statement:—

"Spitalfields Market is in the parish of Christchurch, and comprises a considerable area of land situate on the west side of

Commercial Street, and is owned by Mr. Horner as lessee from the freeholder, and is used for the sale of vegetables and fruit. The market is bounded on the east side thereof by the back walls of the houses in Commercial Street, and is covered with a glass roof supported by columns to protect it from the weather, and, except on the east side thereof, there are no walls or other erections beyond iron railings separating the market from the adjoining streets or property.

"The site of the market is let by Mr. Horner in separate plots or pieces of land, known as and commonly called 'stands,' to numerous persons, and two of these 'stands,' which are respectively of more than 10*l.* annual value, were let by him as to one of them, to the said Charles Allen, and as to the other, to the said Jabez Charles Abbot, who had, for more than the qualifying period, occupied the same stands. The market is rated as one property and the rates had been duly paid by Mr. Horner. The practice is to let these stands to the occupiers for specified periods arranged between them and the owner of the market according to the requirements of the occupiers, and for the tenancies to continue until determined by notice to quit. There is no fixed time for which such notice must be given; but it is usual for Mr. Horner, when he desires to remove a tenant, to give a notice, which is generally in writing, but may be, and sometimes is, given verbally.

"The stands are not numbered, nor have they any distinguishing marks on them; but the precise position in the market of the stand or piece of land which each occupier is entitled to, though not enclosed by Mr. Horner, is defined and well known to him and to the occupier of such stand and to the occupiers of all the other stands in the market, and any person desiring to find the stand of a particular occupier can readily do so by inquiring of any of the porters at the market or of any person acquainted with it.

"Each stand occupier pays a fixed rent for his stand, which is, in the case of every person objected to, more than 10*l.* per annum, and this rent is payable by the occupier whether the stand be actually used by him or not. In addition to the fixed rent, each stand occupier has to pay toll to the owner in respect of the goods sold by him.

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"There is a difference between the manner in which the stands in the market let to the persons occupying the same are used by the occupiers thereof. In a considerable part of the market the stands are boarded over or paved and stalls are placed thereon by the occupiers for the purpose of exposing their goods for view and sale, and these stalls are in almost every instance separated from the adjoining stands by wooden or other movable partitions, and in most cases the name of the occupier is placed by him on a board within the stall, and the goods often remain in the stalls during the night. The said Charles Allen occupies a stall of this description. The remaining part of the market consists of an open space paved with stone, and each occupier of a stand or piece of land on this part of the market occupies and uses the same for the purpose of bringing thereon his carts and waggons, from which, and from the piece of ground occupied by him his goods are offered for sale. The said Jabez Charles Abbot occupies a stand of this description. If the occupier of any of the last-mentioned stands is late for market his stand is often used by another person, who pays a toll to the owner, but no rent; but the occupier is entitled if he afterwards brings his carts to the market to cause the said person to vacate the stand, and to occupy the same himself. This right is, however, seldom exercised, inasmuch as an occupier, if he comes to market at all, generally arrives before it is open."

The revising barrister disallowed the objections and retained the names on the lists, as well as those of forty-six other persons, twenty-two of whom occupied stands of the first kind and twenty-four stands of the second kind described, and who were objected to on similar grounds. The objector appealed.

Asquith, Q.C. (*Peckham*, with him), for the appellant. The revising barrister was wrong. The question, which is now raised for the first time, depends upon the effect of s. 27 of the Reform Act, 1832, and ss. 5, 7, sub-ss. 7, and 12, of the Representation of the People Act, 1884. (1) It is submitted that under these

(1) By the Reform Act, 1832 (2 & 3 Wm. 4, c. 45), s. 27: "That in every city or borough which shall return a member to serve in any future parliament every male person of full age and not subject to any legal incapacity,

sections the claimants have four tests to satisfy, viz., those of occupancy, continuity of occupancy, tenancy, and a tenancy of rateable tenements, but that the facts found in the case do not shew that they possess any of these qualifications. As the stalls have not metes or bounds, the claimants cannot be said to continuously occupy any specific land throughout the qualifying period; their position is not that of tenants but of licensees; and their occupation is too intermittent to render them rateable in respect of the stalls: see *Roberts* v. *Overseers of Aylesbury* (1); *Spear* v. *Bodmin Union.* (2)

[WRIGHT, J. From a reference in *Wood* v. *Leadbitter* (3), it appears that Lord St. Leonards thought it was difficult to distinguish an exclusive licence from an actual demise. But are the words "as owner or tenant" in s. 27 of the Reform Act, 1832, to be read into s. 5. of the Representation of the People Act, 1884?]

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who shall occupy within such city or borough or, &c., as owner or tenant, any house, warehouse, counting-house, shop, or building, &c., of the clear yearly value of 10*l.*, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough."

By the Representation of the People Act, 1884 (48 Vict. c. 3), s. 5, "Every man occupying any land or tenement in a county or borough of the United Kingdom of a clear yearly value of not less than ten pounds shall be entitled to be registered as a voter, and when registered to vote at an election for such county or borough in respect of such occupation subject to the like conditions as a man is, at the passing of this Act, entitled to be registered as a voter and to vote at an election for such county in respect of the county occupation franchise, and at an election for such borough in respect of the borough occupation franchise."

By s. 7, sub-s. 7, "The expression 'borough occupation franchise' means, as respects England, the franchise enacted by s. 27 of 2 & 3 Wm. 4, c. 45."

By s. 12: "Whereas the franchises conferred by this Act are in substitution for the franchises conferred by the enactments mentioned in the second part of the Second Schedule hereto . . . be it enacted that the Acts mentioned in the second part of the said Second Schedule shall be repealed to the extent in the third column of that part of the said schedule mentioned except in so far as relates to the rights of persons saved by this Act, and except in so far as the enactment so repealed contain conditions made applicable by this Act to any franchise enacted by this Act."

By 2nd Schedule, Part 2, s. 27 of 2 & 3 Wm. 4, c. 45, is repealed.

(1) 1 E. & B. 423.

(2) 49 L. J. (M. C.) 69.

(3) 13 M. & W. at p. 850: see Sugden's Vendors and Purchasers, 14th ed. 1862, p. 124.

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The words "as owner or tenant" are used in the statutory form of precept to overseers. (1)

James Gray, for the respondent, was not heard.

LORD COLERIDGE, C.J. The point is one of some importance as a considerable number of votes depend upon it, and the question has been very properly raised. The learned counsel for the appellant had to admit that the conclusions of law which are stated in the case, if they are sound, put him out of court; but he urged that from the facts stated other conclusions of law ought to have been drawn. It is possible that this may be so to some extent; but I think that we ought to affirm the decision of the revising barrister unless his conclusions of law are inconsistent with the facts upon any reasonable construction of them; and so far from thinking this to be the case, my view is that I should myself have drawn the same conclusions of law from the same facts.

It seems that the ultimate owner in fee simple has demised the area of Spitalfields Market to Mr. Horner. As between himself and the claimants, Mr. Horner is the owner of the property and the lessor, and these persons occupy under him fixed spaces at a fixed rent or a fixed payment. The revising barrister is careful to say that the limits of the spaces are known to Mr. Horner, the respective occupiers, and their neighbours in the market. I myself know cases of large single areas of land which are similarly divided into small holdings. There are no hedges or visible lines of demarcation, but there are acknowledged metes and bounds, and the limits of acreage are well known to the lessor, the lessees, and their neighbours. The holding of an ascertained space of land from a person who is entitled to let it at a fixed payment constitutes, in my opinion, at least a tenancy at will. The claimants are, therefore, in occupation as "tenants" within the meaning of s. 27 of the Reform Act, 1832, which,

(1) Registration Order, 1889, Appendix 2, Sched. 3: "A person entitled to be registered as a parliamentary elector in respect of a ten pounds occupation qualification" (inter alia) "must, on July 15 next, be, and during the whole twelve months immediately preceding that day have been, an occupier as owner or tenant of some land or tenement in your parish or township of the clear yearly value of not less than ten pounds."

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though repealed by s. 12 of the Representation of the People Act, 1884, is retained by that section, one might almost say for the purposes of this very case. It is a "condition" of the borough occupation franchise within that section, that if there is occupation "as owner or tenant" of land of the annual value of 10*l.*, the franchise is acquired. Here there was in each case the required value. We cannot say that the revising barrister was wrong, and the appeal must be dismissed.

WRIGHT, J. I am of the same opinion for the same reasons. I wish, however, not to be supposed to hold that the words "owner or tenant" in s. 27 of the Reform Act, are to be read into s. 5 of the Representation of the People Act, 1884. I should have thought that even in the Reform Act the words were only used in order to give the occupation franchise, even where the occupation was as owner; but it is not necessary to decide this.

COLLINS, J., concurred.

Solicitor for the appellant: *E. T. Hargraves.*
Solicitors for the respondent: *Gasquet & Metcalfe.*

H. D. W.

WARBURTON *v.* HUDDERSFIELD INDUSTRIAL SOCIETY.

Nov. 3.

Industrial Society—Application of Profits—"Lawful Purpose"—Subscription to Strike Fund—Industrial and Provident Societies Act, 1876 (39 & 40 *Vict. c.* 45), *s.* 12, *sub-s.* 7.

The application to "any lawful purpose" of the profits of an industrial society authorized by s. 12, sub-s. 7, of the Industrial and Provident Societies Act, 1876, and by the rules of the society, must be taken to mean an application to any lawful purpose ejusdem generis with the general purposes and objects of the society as contained in its rules. Where, therefore, an industrial society established to carry on the trades of general dealers, manufacturers, and farmers passed a resolution at a properly constituted meeting to devote a portion of the profits to a subscription to a strike fund for the support of workmen on strike in the neighbourhood:—

Held, that the purpose was not "a lawful purpose" within the meaning of the rules of the society, and that the society must be restrained from such an application of its profits.

APPEAL from the judge of the Huddersfield County Court.

The Huddersfield Industrial Society, Limited, was an industrial

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society incorporated under the Industrial and Provident Societies Act, 1876, and having its rules registered under that Act.

By r. 2, the objects of the society were declared to be "to carry on the trades of general dealers, both wholesale and retail; also of manufacturers, farmers, and workers of mines and minerals;" and the rule proceeded: "The society shall have full powers to do all things necessary or expedient for the accomplishment of all the acts specified above, including the power to purchase, hold, sell, mortgage, rent, lease, or sub-lease lands of any tenure, and to erect, pull down, repair, alter, or otherwise deal with any building thereon, and to do any other thing permitted by the Industrial and Provident Societies Act, 1876."

By rule 10, relating to the division of profits, "the net profits of all business carried on by this society, after paying or providing for the expenses of management, interest on loans, the proper reduction in the value of fixed stock, and for such interest upon the subscribed capital thereof as aforesaid, shall from time to time be applied by direction of the ordinary quarterly meeting, either to increase the capital, reserve fund, or business of the society, or to any lawful purpose, and the remainder, less any grant that may be made for educational purposes at any general meeting, shall be divided among the members in proportion to the amounts of their purchases at the stores during the half-year . . . ."

By s. 12, sub-s. 7, of the Industrial and Provident Societies Act, 1876, the profits of a society may be applied "to any lawful purpose."

At a properly constituted meeting of the society a majority of the members present passed a resolution that a contribution of 20*l.* should be paid out of the funds of the society to a strike fund for the support of a strike of workmen in the neighbourhood of Huddersfield. This action having been brought by a member of the society to restrain the payment of the contribution, the learned county court judge held that there was no power under the Act of Parliament or the rules to so apply the funds of the society, and gave judgment for the plaintiff. The defendants appealed.

Edward Ford, for the defendants. The Industrial and Provident Societies Act, and the rules of this society registered under it, give express power to devote the profits of the society to any lawful purpose. A strike is lawful, and the support of men on strike is lawful; a contribution to a strike fund out of the society's profits cannot, therefore, be an application of the profits to an unlawful purpose. The county court judge thought that the "lawful purpose" to which the profits might be applied must be ejusdem generis with the objects and purposes of the society in rule 2; but there is nothing in the Act of Parliament or the rules to so restrict the meaning of the expression.

Bunting, for the plaintiff. The "lawful purpose" must not only be lawful in the sense that it is not contrary to the common or statute law, but it must be one which is within the scope of the general objects of the society; in other words, the funds can only be used for the purpose for which they were contributed: *Pickering* v. *Stephenson*. (1) The society cannot go wholly outside its own objects and devote its funds to any purpose not absolutely prohibited by law, with the exception of educational grants, which are expressly named in rule 10; it can only apply them to a "lawful purpose" ejusdem generis with the general objects and purposes of the society.

[He also cited *Tomkinson* v. *South Eastern Railway Co.* (2)]

Ford, in reply.

MATHEW, J. I am of opinion that the learned county court judge was right. The question depends upon the construction to be placed upon rule 10 of the society's rules. A meeting properly constituted passed a resolution voting a sum of 20*l.* to a certain strike fund, and it is said that the society was entitled to apply its surplus profits "to any lawful purpose," that a strike is lawful, and that therefore a subscription to a strike fund is an application of profits to a lawful purpose. But we have to bear in mind the consequences of a construction of the rule which would give a majority power to do anything they liked with the profits which was not absolutely illegal. To construe the rule properly, we must turn to rule 2, which defines the objects of the

(1) Law Rep. 14 Eq. 322. (2) 35 Ch. D. 675.

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society; and, in my judgment, the words "lawful purpose" in rule 10 must be confined to any purpose which the society may carry out under rule 2. It is to be noted that rule 10 specifically mentions only one exception to the general objects of the society, that is to say, educational purposes.

A. L. SMITH, J. I am entirely of the same opinion. It is really only necessary to point out that the expression "any lawful purpose" must have some limitation, or the most ridiculous results might ensue which could never possibly have been in the contemplation of the legislature.

Appeal dismissed.
Leave to appeal refused.

Solicitors for both parties: *Learoyd, James, & Mellor, for Learoyd, Huddersfield.*

W. J. B.

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[IN THE COURT OF APPEAL.]

IN RE ALEXANDER; EX PARTE ALEXANDER.

Bankruptcy—Bankruptcy Notice—"Final Judgment"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g.*)

The judgment at the trial of an action in the Chancery Division declared that a partnership between the plaintiff and the defendant ought to be dissolved as from the day on which the writ was issued, and made an order accordingly. The judgment went on to direct that an account should be taken of all dealings and transactions between the plaintiff and the defendant as co-partners, and that an inquiry should be made of what the property belonging to the partnership consisted, and that payment of what should be found due should be made accordingly. And it was ordered that a counter-claim of the defendant should be dismissed, and that the defendant should pay the plaintiff's taxed costs, up to and including the trial, including his costs of the counter-claim. The subsequent costs were reserved, and the parties were to be at liberty to apply:—

Held, that this was a "final judgment" in the plaintiff's favour for the amount of the taxed costs, and that the plaintiff was entitled to issue a bankruptcy notice against the defendant for that amount.

APPEAL from a receiving order against L. C. Alexander.

The act of bankruptcy alleged in the bankruptcy petition, which was presented by P. J. D'Ardier Lindoe, was the non-compliance with a bankruptcy notice which had been issued by

Lindoe against Alexander in respect of a sum of 123*l.* 4*s.* 2*d.* due to the petitioner under a final judgment obtained by him against Alexander in an action in the Chancery Division of the High Court on June 10, 1891. This action related to a partnership which the plaintiff Lindoe alleged to have existed between himself and Alexander, and the plaintiff claimed that the partnership might be dissolved as from March 24, 1890, the day on which the action was commenced, and that the proper accounts and inquiries might be taken and made.

By his statement of defence the defendant alleged that the partnership had been duly determined by him by a notice dated March 1, 1888, and that he and the plaintiff had never since been partners. And by counter-claim the defendant claimed to have the accounts of the partnership taken as on March 1, 1888, and to have payment from the plaintiff of what should be found to be due from him to the defendant on the taking of such accounts.

By the judgment at the trial of the action on June 10, 1891, the Court declared "that the partnership ought to stand and be dissolved as from March 24, 1890, the day on which this action was commenced, and doth order and adjudge the same accordingly." And it was ordered that the following account and inquiry should be taken and made: "(1.) an account of all dealings and transactions between the plaintiff and defendant as co-partners; (2.) an inquiry of what the credits, property and effects now belonging to the said partnership consist, and any settled account is not to be disturbed. And it is ordered that what on taking the said account shall be certified to be due from either of the parties to the other of them be paid within one month from the date of the Chief Clerk's certificate by the party from whom to the party to whom the same shall be certified to be due." And it was ordered that the defendant's counter-claim should be dismissed, and "that the defendant do pay to the plaintiff his costs of this action, up to and including the trial, including therein his costs of the counter-claim," such costs to be taxed. And the subsequent costs were reserved, and the parties were to be at liberty to apply as they might be advised.

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The plaintiff's costs of the action were taxed at 123*l.* 4*s.* 2*d.*, and the bankruptcy notice was issued in respect of this sum.

Sidney Woolf, Q.C., and *Germaine*, for the appellant. This order for the payment of the taxed costs to the plaintiff is not a "final judgment" within the meaning of sub-s. 1 (*g.*) of s. 4 of the Bankruptcy Act, 1883. It forms part of a judgment which contains other matters which have to be worked out in chambers, and when this has been done the case will go back to the Court for final decision. The judgment must be looked at as a whole in order to see whether it is "final"; part of it cannot be separated from the rest and called a "final" judgment, when the judgment as a whole is not final. When the account is taken it may turn out that a larger sum is due from the plaintiff to the defendant than the amount of costs which is due from the defendant. The Court will have to decide by whom the costs of the inquiry are to be paid. It may be that after taxation the plaintiff could issue execution for the taxed amount, but the right to issue execution is not the true test whether the judgment for costs is a "final judgment." The case is distinguishable from *Ex parte Moore* (1), which was explained in *In re Riddell.* (2)

J. A. Hamilton, for the creditor, was not called upon.

LORD ESHER, M.R. It appears to me that this case is governed entirely by *Ex parte Moore.* (1) Several matters were in dispute before North, J., and he separated one of those matters from the rest and made an order relating to it. It had been asserted by the plaintiff and denied by the defendant, that the partnership was determined as on the date of the commencement of the action, and North, J., decided that the plaintiff was right as to this, and he directed that the defendant should pay the plaintiff's taxed costs of the action up to and including the trial, including his costs of the counter-claim. North, J., did not stay the taxation of the costs, or reserve the question of costs, but he made an out and out order that the costs should be paid by the defendant as soon as they had been taxed. That was a final judgment for the costs. No further direction had to be given by the Court;

(1) 14 Q. B. D. 627. (2) 20 Q. B. D. 512.

nothing remained to be done but to tax the costs, and, so soon as they had been taxed, the judgment was an absolutely final one upon which execution could at once be issued. *Ex parte Moore* (1) shews that the existence of other disputes between the parties does not prevent the judgment which decides one of the matters in dispute from being a final judgment. The arguments which have been used on behalf of the appellant are the same as those which the Court overruled in *Ex parte Moore.* (1) In my opinion the order for payment of costs is a final judgment which will support a bankruptcy notice. The act of bankruptcy was proved, and the receiving order was properly made.

LOPES, L.J. I also think that the present case is governed by *Ex parte Moore.* (1)

KAY, L.J. I agree. There is a judgment for the plaintiff for costs, the costs have been taxed and execution might issue for them. Primâ facie this is a judgment upon which the usual proceedings in bankruptcy might be taken by the judgment creditor. But it is said that in the same judgment which gave the plaintiff the costs up to the trial, and directed their immediate taxation and payment, accounts and inquiries are directed, under which it may turn out that a sum will be found due from the plaintiff to the judgment debtor larger than the amount of the costs which he is ordered to pay to the plaintiff. In that, no doubt, there is a distinction between the present case and *Ex parte Moore* (1), for, from the nature of the inquiry which was there directed, it was impossible that anything could be found due to the defendant. Is that a reason for saying that the judgment for costs in the present case was not a "*final* judgment"? It seems to me that it is a distinction without a difference. We cannot of course tell what the result of the account and inquiry will be. It may increase the amount which is due from the defendant; it may, on the other hand, find something due to him which, if set off, would diminish it. If the judge had thought there was any probability of the account shewing a balance in favour of the defendant, he might have ordered that the costs

(1) 14 Q. B. D. 627.

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should abide the result of the account. But he did not do so, and he was not asked to do it. In my opinion, the judgment for costs is as final as any judgment can be, and I have no doubt it was intended by the judge to be a final judgment. He did not think fit to order the costs to abide the result of the account, and the debtor is in effect asking us now to do that which the judge did not think fit to do. I think that the case is governed by *Ex parte Moore* (1), and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Hindson Miller & Vernon; Wynne, Holme, & Wynne.* W. L. C.

Dec. 2.

DYKE *v.* GOWER.

Adulteration—Guilty Intent—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 9.

By s. 9 of the Sale of Food and Drugs Act, 1875, "No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it, so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds":—

Held, that the words "so altered" refer to a physical alteration of the article, irrespective of the intent with which the alteration is made.

The respondent, a retail milk seller, poured into a pail eight barn gallons of unskimmed milk, which she sold therefrom in small quantities to her customers, dipping it out of the pail from time to time with a measure. The sale of the contents of the pail extended over a space of between four and five hours, during the whole of which time, owing to the neglect of the respondent to keep the milk stirred, the cream was continually rising to the surface. When not more than two quarts of milk remained in the pail, the appellant purchased of the respondent a pint of milk, which was served to him from the pail, and which, upon analysis, shewed a deficiency of 33 per cent. of fatty matter. The respondent did not disclose the deficiency to the appellant. The deficiency was entirely due to the manner in which the earlier customers had been served.

Held, that the respondent, in so selling the milk to the appellant without disclosing its condition, was guilty of an offence against the above section.

Pain v. *Boughtwood* (24 Q. B. D. 353) followed.

CASE stated by a metropolitan police magistrate.

An information was laid by the appellant, an inspector acting

(1) 14 Q. B. D. 627.

under s. 13 of the Sale of Food and Drugs Act, 1875, against the respondent, a dairy-woman, charging her with having sold to him a certain article of food, to wit, milk, which had had 33 per cent. of the original fat abstracted, and which abstraction injuriously affected its quality, substance, or nature, without making disclosure of the said alteration, contrary to the provisions of s. 9 of the said Act. It was proved that the milk in question arrived from the country by rail in a churn containing eight barn gallons at 10 A.M. The contents of the churn were poured into a pail and sold in small quantities, the milk being dipped from the pail from time to time between 10.30 A.M. and 3 P.M., as customers entered the shop. The purchase by the appellant was made at 3 P.M., at which time there were only from three pints to two quarts remaining in the pail. Upon analysis it was found that 33 per cent. of the original fatty matter was deficient in milk so sold to him. No disclosure of such deficiency was made by the respondent to the appellant. The respondent's daughter, who served in the shop, said that she knew that if the milk was not stirred the cream would rise, and it was her usual custom to stir the milk; but she could not say that it had been stirred on this occasion. It was suggested by the respondent that the deficiency of fat was accounted for by the continual dipping of the measure in serving the earlier customers. The magistrate being of opinion that the respondent did not abstract from the milk any of the cream with intent that the milk should be sold in its altered state without notice, and that the diminution in the quantity of cream was entirely due to the manner in which the milk was served to the customers from time to time from the pail, dismissed the summons subject to a case for the opinion of the Court.

McCall, Q.C. (*A. Gill,* with him), for the appellant. Sect. 9 deals with two offences—the alteration of an article of food by abstracting part of it, and the selling of it in such altered state. A guilty intent is not a necessary part of the latter offence. The object of the Act was to protect the purchaser and to insure so far as possible that articles sold for food should be pure. With that end in view, the legislature provided that when once

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it can be shewn that a person has without notice sold an article of food from which a part has been abstracted, he shall be liable, whether he knew of the abstraction or not, unless he can prove under s. 25 that he bought the article with a warranty and sold it in the same state as that in which he bought it. That is the sole defence which the legislature leaves him, and such defence is not available here. The case is covered by the authority of *Pain* v. *Boughtwood*. (1) The intent with which the abstraction was made is immaterial upon an information against the seller.

Dale Hart, for the respondent. In every proceeding against a seller under s. 9, it must be alleged that the alteration was effected "with the intent that the article should be sold in its altered state without notice." For the offence lies in selling the thing "so altered." The information in omitting such allegation discloses no offence. But further, the decision in *Pain* v. *Boughtwood* (1), that a person could be convicted of selling an altered article, although he did not know of the alteration, was wrong. A man cannot disclose what he does not know. In that case the defendant was not represented by counsel before the Divisional Court. If dissatisfied with that decision the Court will refuse to be bound by it, there being in these cases no appeal to the Court of Appeal.

LORD COLERIDGE, C.J. I am of opinion that the magistrate was wrong, and that the case must be remitted to him to be further dealt with. The facts of the case are simple. A milk seller had milk sent up to her from the country in comparatively large quantities; she poured it into a pail and sold it in small quantities to her customers, for that purpose dipping it from time to time out of the pail with a measure. It is matter of common knowledge that, unless milk is frequently stirred, there is a tendency on the part of the cream or fatty matter of the milk to rise to the top, leaving the lower portion of the milk denuded of the fat which it originally contained. The milk seller sold the milk in that condition, and she did so in one sense fairly enough; for, in the absence of any evidence to the contrary, I will assume that she did not gain by it—that is to

(1) 24 Q. B. D. 353.

say, that she sold the upper portion of the milk which contained an excess of fat at the same price as that at which she afterwards sold the lower portion, which was deficient in fat. But this Act was passed with the object, not of punishing the seller, but of protecting the buyer, and of insuring, so far as it is possible to insure, such a result, that a person who buys an article of a particular description should get a genuine article, and one which contains the proper quantity of the different elements that an article of that description ought to contain. The section under which this information is laid (s. 9) provides that "no person shall"—I purposely for the moment omit the words as to intent—"abstract from any article of food any part of it so as to affect injuriously its quality, substance, or nature." Now, that had undoubtedly been done here; in the course of the sale of the greater portion of the pail, owing to a neglect to keep the milk stirred, there had been, unconsciously perhaps, abstracted from the milk its fatty matter to an extent which injuriously affected its quality. Then the section goes on, "And no person shall sell an article so altered"—that is, altered physically, altered by the abstraction of a part of it so as to injuriously affect its quality—"without making disclosure of the alteration." Here the respondent has admittedly sold milk so altered without making any disclosure. Has she not then been guilty of an offence against the section? It is contended that she has not, on the ground that the earlier branch of the section prohibits a person from abstracting part of an article of food "with intent that the same may be sold in its altered state without notice," and it is said that the offence of selling aimed at by the latter part of the section is limited to the sale of an article "so altered"—that is to say, altered with such intent. The argument is that, to however large an extent a person may have altered an article of food, if at the time of the alteration he did not contemplate selling it, he would have a right to sell it notwithstanding that its quality was injuriously affected, because the alteration had not been made with the prohibited intent. To my mind, so to construe the section would be to make nonsense of it, and to deprive the public of the greater part of the protection which the section was intended to afford. It is

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not necessary in the interests of the public to prohibit the mere alteration of an article of food, unless the alteration is coupled with the intent of selling it in its altered state without notice, for the mere alteration without such intent may be perfectly innocent. Where, however, the alteration is followed by actual sale, the intent with which the article was altered must become perfectly immaterial, the injury to the purchaser being just the same whether there was a wrongful intent or not. But the subject is not bare of authority. In *Pain* v. *Boughtwood* (1), it was held that a mens rea was not a necessary ingredient in the offence of selling an altered article under s. 9. It was indeed suggested to us, that as in that case no counsel had appeared to argue on behalf of the defendant, we should not hold ourselves bound by it. If I entertained any serious doubt as to that case having been correctly decided, I should be prepared to do what I have done in other similar cases in which there was no right of appeal, namely, to have the question argued before a fuller and larger Court. But I do not entertain any such doubt. It seems to me a perfectly right and proper decision, and only confirms the opinion which I have formed independently of it.

WRIGHT, J. If s. 9 of the Sale of Food and Drugs Act, 1875, stood by itself as constituting the whole of an Act of Parliament, and there had been no other legislation on the subject to throw any light upon it, I confess I should have come to a different conclusion, and have thought that some element of guilty intent was a necessary part of the offence with which the respondent is here charged. But when one looks at the history of the law, there is very great reason to suppose that Parliament deliberately framed this section with the view of excluding guilty intent from the facts which it was necessary to prove in order to establish the commission of the offence. In 1873, two years before the present Act was passed, the case of *Fitzpatrick* v. *Kelly* (2) was decided under the Adulteration of Food Act then in force (35 & 36 Vict. c. 74), by s. 2 of which it was provided that "every person who shall sell as unadulterated any article of food or drink which is adulterated" shall be guilty of an

(1) 24 Q. B. D. 353.

(2) Law Rep. 8 Q. B. 337.

offence; and by s. 3, that "any person who shall sell any article of food or drink, knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser before delivering the same, shall be deemed to have sold an adulterated article of food or drink, under this Act." The information charged the defendant with having sold as unadulterated, butter which had been largely adulterated with lard and other substances. There being no evidence that the defendant knew that the butter had been mixed with the fraudulent intent of increasing its weight or bulk, the magistrate dismissed the information on the ground, amongst others, that such evidence was essential. But the Court of Queen's Bench held that s. 3 was not intended to cut down the effect of s. 2, and that upon an information under s. 2 the defendant's knowledge of the adulteration was perfectly immaterial. Knowing of that decision, Parliament in 1875 drafted the present Act in the form in which they did, and it is only reasonable to suppose that from their knowledge of the construction which the judges had put upon the section in the earlier Act they could tell what construction the judges would be likely to put upon a similar section in the Act they were passing, and would know that it would be construed without any reference to guilty intent. For these reasons, I concur in, besides feeling myself bound by, the decision in *Pain* v. *Boughtwood*. (1)

Case remitted to the magistrate.

Solicitors for appellant: *Capron, Dalton, Hitchins & Co.*
Solicitor for defendant: *Ricketts.*

(1) 24 Q. B. D. 353.

J. F. C.

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Oct. 27.

[IN THE COURT OF APPEAL.]

BOUND *v.* LAWRENCE.

Master and Servant—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—*Workman—Person engaged in Manual Labour — Real and substantial Occupation.*

The test of whether an employee is engaged in manual labour, within the meaning of the Employers and Workmen Act, 1875, is—whether such labour is his real and substantial employment, or whether it is incidental and accessory to such employment.

The appellant, a grocer's assistant, whose duty it was to serve customers in a shop, had also other duties involving manual labour, such as making up parcels for customers, carrying parcels from the shop to the cart at the door, and bringing up goods from the cellar to the shop:—

Held, reversing the decision of the Queen's Bench Division, that such occupations were incidental to his real and substantial employment as a salesman, and that he was not engaged in manual labour within the meaning of the Employers and Workmen Act, 1875.

APPEAL from a judgment of the Queen's Bench Division on a case stated by justices.

Complaint was made to the justices by the respondent, under the Employers and Workmen Act, 1875, against the appellant for leaving the service of his employer without notice.

Upon the hearing of the complaint, it was proved that the respondent was a grocer, and had engaged the appellant as a shop-assistant in the grocery business at a salary of 25*l.* a year, in addition to his board and lodging upon the premises. Upon such hiring it was agreed that one month's notice should be given by either party to terminate the agreement. The respondent kept porters who did the heavy manual work of the business, and the appellant performed the ordinary duties of an indoor assistant principally, and almost exclusively, in receiving orders and serving the customers over the counter.

On the matter being referred back by the Divisional Court to the justices to find specifically what manual labour the appellant performed, they reported that it was further proved in evidence that the appellant did not carry sacks of flour or do suchlike heavy work, but that he served customers in the shop from behind the counter, wrote down their orders, made up parcels of

goods, carried parcels up to eighty-four pounds from the shop to the cart at the door, occasionally carried into the shop sides of bacon hanging at the shop door, brought up each Monday from the cellar bags of sugar, boxes of soap, and sides of bacon, occasionally assisted at the pulley in getting up goods from the cellar, and occasionally wheeled goods in a truck from the warehouse to the shop.

The question stated for the opinion of the Court was, "Is a grocer's assistant in his shop a workman within the provisions of the Employers and Workmen Act, 1875?"

The two learned judges of the Divisional Court before whom the case came differed in opinion, and the decision of the justices was affirmed.

The appellant appealed.

Bailhache, in support of the appeal. The appellant may have to do manual work; but that is not sufficient to bring him within the class of persons engaged in manual labour. By s. 10 of the Act "the expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, has entered into or works under a contract with an employer." The general words should be restricted to occupations ejusdem generis with those indicated in the particular words. The test of whether a person comes within the Act is that laid down by Lord Esher, M.R., in *Morgan* v. *London General Omnibus Company*. (1) The appellant's "real and substantial business" was to attend to customers in the shop, and his employment depends on his skill in doing that work, and not on his strength for manual labour. Some sort of work with the hands is incidental to all employments. Even a chemist's assistant has to do some manual work in compounding medicines, but he certainly could not be treated as engaged in manual labour. [He cited *Cook* v. *North Metropolitan Tramways Co.* (2), *Yarmouth* v. *France* (3), and *Hunt* v. *Great Northern Railway*. (4)]

(1) 13 Q. B. D. 832.
(2) 18 Q. B. D. 683.
(3) 19 Q. B. D. 647.
(4) [1891] 1 Q. B. 601.

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Asquith, Q.C., and *Rowlatt*, for the respondent. The question of law which naturally arises is, whether, on the facts stated, there was evidence on which the justices could reasonably find that the appellant was engaged in manual labour, and there certainly was evidence, at all events on the second occasion on which the case was before them. If, however, the question whether the occupation of the appellant brings him within the statute is for the decision of the Court, as would appear from the cases, then it is certainly open to argument that the manual labour he was engaged in was not merely incidental to his employment, but formed a substantial part of it. Manual labour involves an exercise of the physical powers, and the mere fact that a part of his time was spent in lighter work does not affect the inference to be drawn from the fact that a part, and it is submitted a substantial part, of his duty involved the exercise of considerable physical power. The decision in *Cook* v. *North Metropolitan Tramways Co.* (1) should not be supported.

LORD ESHER, M.R. The question in this case is whether, on the facts stated by the magistrates, the appellant can be said to be engaged in manual labour within the meaning of this Act of Parliament. It seems to me that the decision in *Morgan* v. *London General Omnibus Co.* (2) assists us to this extent, that it shews that we must not look at what the appellant may do incidentally in the course of his employment, but must see what is his real and substantial work. Now, I take it that if we examine this case it appears that the appellant was employed as a grocer's assistant in a shop, and his business was to take orders from the customers and to carry them out. In doing this he may have to shew goods, and if the customers take away the goods he has to make up the parcels. In doing this he has to use his hands, and the question is whether that makes him a manual labourer. There can be no manual labour without user of the hands; but it does not at all follow that every user of the hands is manual labour, so as to make the person who does it a manual labourer. Now, the principal part of the appellant's employment is selling to the customers across the counter. That

(1) 18 Q. B. D. 683. (2) 13 Q. B. D. 832.

is his substantial employment, and if he has to do other things which involve physical exertion we must see whether that is not incidental to his real employment. In this case I cannot doubt that that is so. The findings of fact seem to me to negative the idea that the work described was any part of his real and substantial employment. If the mere user of the hands in matters incidental to a man's employment is to constitute him a manual labourer, it would extend the Act to every shop-assistant in every shop, great or small, which cannot have been the intention of the legislature. I am of opinion; therefore, that the decision of the Queen's Bench Division, confirming that of the justices, should be reversed.

FRY, L.J. We have to determine this question on the facts disclosed in the further statement of the magistrates. It appears to me, on the true construction of the statute, that the appellant does not come within the general words. It is to be observed that it is difficult to imagine any work done by man so purely intellectual as to require no kind of work with the hands; and the converse is equally true, that there can hardly be work with the hands that requires no intellectual effort. If, then, the words "manual labour" are to have the full significance which could be put on them, they would be extended to every kind of employment. That cannot be the true meaning of the statute, but some more confined interpretation must be arrived at. I agree that this must be done by looking to the nature of the substantial employment, and not to matters that are incidental and accessory. The determination of what is substantial and what accessory may be a question of difficulty; but, in my view of this case, the appellant was not engaged in manual labour. In his occupation the knowledge and skill required in selling the goods to customers is more important than the manual work that he does, and the latter is an incident of his employment. I am fortified in this view by the observation made by the Master of the Rolls as to the inclusion of all shop-assistants, men and women, under any more extended interpretation of the words of the Act. I say nothing as to the argument that the general words of this section are to be applied as if they

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were ejusdem generis with the particular words, except that, in my opinion, that argument has not infrequently been applied in such a way as to defeat rather than carry into effect the intention of the legislature.

LOPES, L.J. The appellant, in order that he may be brought within the Act, must be engaged in manual labour. In the view I take of the cases and the facts, I do not think that he is so engaged. What we have to look at is the substantial nature of his employment, and that is dealing with customers in the shop. That is his main duty, though it appears in the additional facts found by the justices that there are certain other duties which he has to perform. These, however, are incidental to his employment, and are not the main duties. In the course of the case I asked what shopman or shopwoman would be outside the statute, if every act performed by the hands was to make the doer of it a manual labourer. It is clear to me that if we include this appellant among the persons described in the Act we should have to include the whole class of shop-assistants whose work cannot be carried on without some user of the hands. That user may even involve considerable physical exertion; but so long as it is incidental to their employment and not the substantial object of it, they are not brought within the statute as persons engaged in manual labour.

I agree that this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Warriner & Kinch, for Llewellin & Moore, Newport, Mon.*

Solicitor for respondent: *Warmington, for Evans, Newport, Mon.*

A. M.

LEE *v.* DANGAR, GRANT & CO., HOLLAMS, SONS, COWARD, & HAWKSLEY, AND NATHAN & CO.

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Nov. 7, 14, 21; *Dec.* 15.

Execution—Concurrent Writs of Fi. Fa.—Sheriff—Poundage—Penalties under Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55), *s.* 29, *sub-s.* 2 (*ii.*)—*Order* XLII., *r.* 17.

The Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29, imposes a penalty on any sheriff's officer who "takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by the Act or any other Act."

An execution debtor brought an action against the execution creditors, their solicitors, and the sheriff's officers for the county of London for alleged illegal conduct in levying execution. It appeared that the solicitors issued two writs of fi. fa. for the amount of the judgment debt and costs, one directed to the sheriff for the City, the other to the sheriff for the county of London, and gave each set of sheriff's officers notice of the other writ, and requested them to be careful to prevent a double execution. Possession was taken under both writs. The execution in the City of London having been paid off, the defendants, the sheriff's officers for the county of London, demanded from the plaintiff payment of a sum part of which consisted of fees payable by the execution creditors, and did not withdraw till payment of this amount had been made under protest. They also claimed, but did not insist on, the payment of poundage. There was no evidence of malice on the part of either the execution creditors or their solicitors, or of want of reasonable cause for the course adopted:—

Held, by Denman, J., that neither the issue of nor the seizure under the two writs of fi. fa. was illegal; that the sheriff's officers for the county of London were not entitled to poundage, and were liable to the plaintiff in nominal damages for not having sooner withdrawn, but that they were not liable to the penalty of 200*l.* for extortion under s. 29 of the Sheriffs Act, 1887.

FURTHER consideration before Denman, J.

The facts and arguments are fully stated in the judgment.

Bucknill, Q.C., and *C. J. Edwards*, for the plaintiff, the execution debtor.

Finlay, Q.C., and *A. T. Lawrance*, for the defendants, the execution creditors, and the defendants, their solicitors.

Cock, Q.C., and *Rose-Innes*, for the defendants, the sheriff's officers.

Cur. adv. vult.

DENMAN, J. The plaintiff, Mr. Lee, brought this action against three sets of defendants in respect of alleged illegal

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conduct in the suing out of and dealings in relation to two writs of fi. fa. The case against the defendants, Dangar, Grant & Co. and Hollams & Co., was mainly founded upon want of reasonable and probable cause and malice; the case against the defendants Nathan & Co., on a claim for a penalty of 200*l.*, said to be due for illegally demanding poundage and other payments in order to induce them to withdraw from possession of his property seized by them under one of the above-mentioned fi. fas. There was also a claim against the other defendants for procuring Nathan & Co. to make this demand, and against Nathan & Co. for trespass in remaining in possession after satisfaction of the judgment. The case came before me and a special jury; but it was agreed between the parties that, inasmuch as the case raised questions mainly of law, I should hear arguments upon the facts admitted, taking evidence, if necessary, upon any particular facts which might turn out to be in dispute.

The facts, as admitted, or as found by me when necessary, are as follows: The plaintiff, Mr. Lee, was a merchant in galvanized iron and wire. He dealt with the defendants, Dangar & Co., and early in 1890 he owed them a sum of 2299*l.* 1*s.* 11*d.*, and was under liability to take up certain bills to a much larger amount, about 26,000*l.* On February 19, 1890, Dangar & Co., through the defendants, Hollams & Co., as their solicitors, brought an action for the amount of 2299*l.* 1*s.* 11*d.* against the plaintiff. An application was made under Order XIV. and a conditional order made. The condition not having been performed, judgment for 2328*l.* 13*s.* 9*d.* for the debt and taxed costs was signed on April 15, 1890. In the meantime, after a correspondence between Hollams & Co., on behalf of the defendants Dangar & Co., and the present plaintiff's solicitors, Messrs. Bramall, a second writ was issued on March 10, 1890, by Hollams & Co., for Dangar & Co., against the plaintiff for 8197*l.* 7*s.* 10*d.*, "for balance of money lent by plaintiffs to defendant, and money advanced against goods consigned by defendant to plaintiffs for sale on his behalf, after giving credit for money received by plaintiffs in respect of the portion of the goods sold." Between March 10 and April 15 several extensions of time were granted for payment into Court in the first action; but, the money not having been paid, nor

security given, judgment in the first action was signed on April 15, as above mentioned. I can see no ground whatever for imputing any malice or undue motive in either Dangar & Co. or their solicitors, Hollams & Co., for their conduct in the course thus so far pursued. On April 21 the plaintiff Lee's solicitors, Bramall & Co., wrote to Hollams & Co., strongly deprecating any execution, and urging that it would have the effect of inducing other creditors to take proceedings in bankruptcy. I do not think that any blame could have been attached or any malice imputed to Dangar & Co. and Hollams & Co. if they had, after receiving this letter, come to the conclusion that it was not desirable to listen to this suggestion. But, in fact, they did not receive it before the fi. fas. were actually lodged, as next mentioned.

Now I come to that part of the case which has been relied upon as making out a cause of action against these defendants. On April 21 *two* writs of fi. fa. were issued, one directed to the sheriff of the City, the other to the sheriff of the county of London. Both were indorsed by Hollams & Co. in the same terms, viz., "to levy 2328*l.* 13*s.* 9*d.* and 1*l.* 5*s.* for costs of execution and interest from April 15, besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses." These writs were on the same day—before Hollams & Co. had received the letter from the plaintiff's solicitors of that date, deprecating execution, and urging that it would be more to the interest of the defendants, Dangar & Co., not to proceed upon the writs—lodged with the sheriffs, and Hollams & Co.'s clerk in lodging them told the officers of each of the sheriffs of the writ issued to the other sheriff, and told them to be very careful to prevent a double execution for the amount. On the same day, on receiving the plaintiff's solicitors' letter, Hollams & Co. wrote to the plaintiff's solicitors, Bramall & Co., stating that the writs had been lodged before receipt of their letter, but that with their clients' consent they had written to the sheriff's officers telling them to do nothing without further instructions, adding, "Meantime, it is of course understood that our clients have free hands with regard to the disposal of the goods abroad"—meaning the goods the subject of the second action. They had, in fact, written to the officers of both sheriffs

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requesting them to do nothing until further instructions, and in the letter to the defendants, Nathan & Co., the officers of the county sheriff, a postscript was added: "If you are already in possession we do not wish you to withdraw without further instructions." On the same day the City sheriff's officers, Odell & Co., wrote to Hollams & Co., informing them that they had taken possession, and adding, "We are informed by the manager that the stock at the Cannon Street premises is valued at between 7000*l.* and 8000*l.*" On the 22nd the plaintiff wrote to the defendants, Dangar & Co., urging the removal of the men in possession at Cannon Street and Thames Street, in the City, and at Limehouse, in the county; and on the same day the defendants, Hollams & Co., wrote to Bramall & Co., stating that Messrs. Dangar & Co. would concur in what might be necessary to withdraw the sheriff's officers from possession, "the defendant" (Lee, the now plaintiff) "paying all fees and expenses already incurred, it being understood that the sheriff's officers do not resume possession, and that the defence in the second action be withdrawn, the plaintiffs to sell the goods on hand as and when they might think fit, and to sign judgment in that action for the loss, if any, that might result." A correspondence ensued between the solicitors, in which proposals were bandied to and fro, during the progress of which the defendants, Nathan & Co., wrote, on April 25, to Hollams & Co., asking whether they were to proceed to sell; to which Messrs. Hollams & Co. replied, "We do not wish you to sell at present, as the matter may probably be arranged shortly." The last proposal which had been made by Hollams & Co. was on the 24th, and was a modification of that offered on the 22nd, by proposing that an arbitrator should decide for what amount the judgment in the second action should be signed. I think there was nothing unfair or unreasonable in these proposals, certainly nothing to justify any suspicion that either Dangar & Co. or Hollams & Co. were doing more than they had a right and a duty to do—viz., to decline to withdraw the sheriff's officers except upon their own terms. I am at present assuming that there was nothing wrong in their conduct in putting in the executions in the first instance as they did. On April 28, Hollams & Co. wrote asking whether they

were to understand their offer of the 24th to be rejected. And on the same day Bramall & Co. replied that Lee was about to have an interview with certain creditors on May 1, and that he would then seek to obtain their consent to the proposal made, and asked for a day or two longer to consider it. On April 30 the execution in the City was paid off, and Messrs. Odell & Co., the sheriff's officers, received 2400*l.* 7*s.* 3*d.*, of which they at once forwarded 2332*l.* 11*s.* 3*d.* to Messrs. Hollams & Co., 2328*l.* 13*s.* 9*d.* of which sum was in respect of the debt and costs in the first action, 1*l.* 5*s.* for the writ, and 2*l.* 12*s.* 6*d.* for interest, retaining 60*l.* 14*s.* for poundage, 2*l.* 2*s.* for levy fees, and 5*l.* for possession-money. Hollams & Co., the same day, acknowledged the receipt of the 2332*l.* 11*s.* 3*d.*, "the amount of the levy herein," and at once wrote to Nathan & Co. informing them of this payment, and requesting them to withdraw "on payment of the costs of the execution, and the sheriff's and their charges." Nathan & Co. the next day, May 1, ordered the man in possession to quit possession on payment of possession-money and 63*l.* 2*s.* No question arises as to the possession-money, which was paid, but the 63*l.* 2*s.* was made up of a charge of 1*l.* 2*s.* 6*d.* for the writ, 1*l.* 1*s.* for the levy fee, 4*s.* mileage, and 60*l.* 14*s.* poundage; and it is for insisting on these payments that the plaintiff sues the defendants, Nathan & Co., for demanding, and the other defendants for procuring them to demand, payment, so as to render them liable to the penalty of 200*l.* or damages respectively.

On May 1 four letters were written, some of which appear to have crossed one another. I do not think it of any importance, even if it were possible, to ascertain the exact order in which they were written and received. In one of that date Hollams & Co. write, asking Bramall & Co. what their clients meant to do with regard to the proposals made relating to the second action, to which no direct answer appears to have been sent. Two other letters were put in from Bramall & Co., also of May 1, one to Hollams & Co., complaining that notwithstanding the payment yesterday of the debt and costs to the City sheriff's officers, they were still keeping the county sheriff's officers in possession, and stating that for this substantial damages would

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be claimed; the other to Nathan & Co., to the same effect, and adding that under s. 29 of the Sheriffs Act they had rendered themselves liable to a penalty of 200*l.* for having demanded money not payable by the rules under that Act, and demanding immediate withdrawal and payment of that penalty. Hollams & Co., on the next day, May 2, wrote to Bramall & Co., expressing their surprise; stating correctly the course they had taken, as above described, and adding: "We gather from the sheriff's officers that there is some question as to the amount payable in respect of the sheriff's fees, which are, however, subject to taxation under the rules of the Sheriffs Act, 1887"; to which, on the same day, Bramall & Co. replied as follows: "We are obliged by your letter of to-day, which appears to us to conclusively establish our client's claim against yourselves. We presume that you are aware of the Rules of the Supreme Court of August, 1888, under the Sheriffs Act, 1887, which provide that in abortive executions, as this unquestionably is, the fees are to be paid by the execution creditor and are not recoverable by him. This notwithstanding, you have kept the man in possession two whole days, because you instructed him not to withdraw without payment of that which neither he nor you, nor your clients, had any right to claim. Indeed, Messrs. Nathan & Co. tell us that they were specially instructed to claim 1*l.* 2*s.* 6*d.* for your costs of the abortive writ. We have paid them, under protest, what they claimed; but we do not mean to let the matter rest here. Unless we are much mistaken, we shall be able to prove that you personally have much 'concern with such questions,' when you give such instructions as your letter admits." On the same day Bramall & Co. wrote to Nathan & Co. as follows: "Our clients inform us that your man in possession declines on your instructions to withdraw except upon payment of 63*l.* 2*s.* We therefore send you enclosed, under protest, our cheque for that amount. Please acknowledge receipt, and wire to your man to withdraw. We, of course, repeat our letter of yesterday, and also claim the repayment of the 63*l.* 2*s.*" This letter was sent by hand to the defendants Nathan's office with Bramall & Co.'s cheque for 63*l.* 2*s.* When it arrived there was only a clerk in the office, who returned the

cheque by the messenger who brought it with a letter stating that Mr. Nathan had gone into the City to call upon Hollams & Co. and upon Bramall & Co. The cheque and letter came into Bramall & Co.'s hands early in the afternoon, and later on—viz., about 4 P.M.—Nathan called at Bramall & Co.'s and justified himself for what he had done by reading Hollams & Co.'s letter to him of the 30th, and saying that the direction to withdraw on payment "of the sheriffs' and their" (i.e., Nathan & Co.'s) "charges" must mean or include poundage. He also said that he had no proof that poundage had been paid to the City sheriff, and intimated a doubt as to which sheriff was entitled to poundage, and requested Mr. Bramall to write a letter stating that the poundage had been paid to the City sheriff, which he did, and Mr. Nathan took that letter away. The same evening, May 2, Nathan & Co. wrote to Bramall & Co. acknowledging their letter, stating that the poundage had been already paid, and inclosed an order for their man to withdraw on payment of Hollams & Co.'s costs of writ of fi. fa. fee, 1*l.* 2*s.* 6*d.*, and their levy fee and mileage, 1*l.* 5*s.*; and on the same evening the man withdrew on receipt of those amounts, 2*l.* 7*s.* 6*d.* in all. On the next day, May 3, Hollams & Co. replied to the plaintiffs' solicitors' letter of May 2, stating that they were wrong in treating the county execution as an "abortive execution." No answer to this letter was put in; but on the same day Bramall & Co. wrote a letter headed "Gospel Oak Co., i.e., Lee ats. Dangar & Co. (second action)," as follows: "Referring to your letter of 1st inst., we have no suggestion to make. We have throughout considered this action to be unfounded." Nothing more appears to have taken place with reference to the subject-matter of the present action until August, when the writ was issued.

The first contention for the plaintiff was that the defendants Dangar & Co. and Hollams & Co. were guilty of an illegal act in issuing two writs concurrently for the whole amount due under the judgment in the first action, one in the City and another in the county, and it was contended that the mere issue of two writs of fi. fa. concurrently into two different counties is illegal. Many cases were cited which, it was contended, were in support of this proposition; but none of them, in my opinion,

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is inconsistent with the statement of the law as laid down in the text-books to the contrary. I think that the law on this subject is correctly laid down in Tidd's Practice, 8th ed. p. 1032, who says: "The party may have several writs of the *same* sort running at the same time, in order to take the defendant, or his goods, &c., in different counties." And in Lush's Practice, 3rd ed. p. 583, I find it put thus: "Writs of fi. fa., ca. sa., and elegit may all be sued out at the same time, or several of each issued at the same time into several counties." Order XLII., r. 17, is, in my opinion, only a statement of the same law, and is, when read according to its most obvious meaning, irreconcilable with the contention of the plaintiff on this point: "Every person to whom any sum of money shall be payable under a judgment shall be entitled to sue out one or more writs of fi. fa. to enforce payment thereof."

But it was contended for the plaintiff that, even if there was a right to issue the two writs in question, there was no right to put them in force by seizure, and that the defendants, Dangar & Co. and Hollams & Co., were guilty of an illegal act in ordering the two sheriffs to seize; and that it was also illegal in the sheriff to seize without further inquiry after notice that there was a writ in the hands of the other sheriff. As regards the sheriff now sued, I can find no authority which would make him liable for the mere seizure. It is his duty to execute the writ, and, provided he act properly in the discharge of this duty, the execution debtor would have no reason to complain. As regards Dangar & Co. and Hollams & Co., it was contended that, even if there was a right to issue the writs, it was an actionable wrong in them to authorize a seizure in both bailiwicks, because they had knowledge that the goods first seized, viz., those in the City, were abundantly sufficient to satisfy the judgment and all expenses, and the letter of the City sheriff's officers, Odell & Co., to Hollams & Co. of the 21st, was relied upon as notice to them and their clients, Dangar & Co., that the goods in the City were of the value of 8000*l.* But this letter did not reach Hollams & Co. until the seizure in both places had actually taken place, and in any case I do not think that the mere notice that the present plaintiff's manager had made such a statement necessarily called

upon Hollams & Co. to act upon that statement as a fact. The most that they were bound to do, I think, was that which they in fact did, as was proved by their clerk, Mr. Andrews, viz., to inform the officers of each sheriff, when he lodged the writ, of the writ he was lodging with the other sheriff, and to warn them to be very careful to prevent a double execution for the same amount. I think the case of *Cooper* v. *Rowe*, cited in the same page of Tidd's Practice, immediately after the passage already cited, shews that in taking this course Hollams & Co. did all the law requires them to do in relation to the two writs up to this point. The dictum of Mellish, L.J., in the case of *Ex parte Williams, In re Davies* (1), recognises the legality of the issue of a number of writs into several counties. He says, in so many words, "There may be a number of writs issued into different counties;" nor does the case contain anything inconsistent with the law as laid down in Chitty and Lush and later text-books, including Mr. Edwards's carefully written book on the law of execution, where the law is laid down as follows at p. 109: "The execution creditor, therefore, may sue out a writ or writs into every county in which it is supposed that the execution debtor has property available under them or either of them. But he must be careful to countermand every other writ than that on which he actually proceeds" (that is, as I read it, goes beyond mere seizure), "or, to modify his instructions on such other writ according as he has received the whole or part of the debt by a levy on any one of the writs."

The dictum of Cave, J., in delivering judgment in *Ex parte Ford, In re Ford* (2), was cited as shewing that the text-books were wrong in laying it down as above mentioned. He, no doubt, says, "Nor could the judgment creditor issue another fi. fa. into another county, for, as it is established by *Chapman* v. *Bowlby* (3), a second fi. fa. cannot be issued until the first is returned," &c.; but this observation must be taken with reference to the particular case, which only raised the question whether an interpleader order directing the sheriff to withdraw amounted to a stay of execution, which it was held to do; so that in that

(1) Law Rep. 7 Ch. 314. (2) 18 Q. B. D. 371.
(3) 8 M. & W. 249.

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case it was impossible to tell what might be levied under the existing fi. fa. until the interpleader was disposed of. The case of *Chapman* v. *Bowlby* (1) was a case in which there had been an actual levy under the first writ, not a mere seizure, and it was only decided that in such a case a second writ ought not to have been issued before the first had been returned, and therefore the second writ was held to have been issued irregularly and was set aside. The cases of *Andrews* v. *Saunderson* (2), *Hodgkinson* v. *Whalley* (3), and *Miller* v. *Parnell* (4), do not, in my opinion, affect the question. They were all cases of a ca. sa. issued either concurrently with or before the return of a fi. fa., which obviously gives rise to different considerations affecting the liberty of the subject.

I have so far been dealing with legal contentions only; but it was urged for the plaintiff that there was here evidence of malice and want of reasonable cause for the course adopted. I will only say upon this question that, being in the position of a jury, I do not think that there was any malice of any kind in either Dangar & Co. or Hollams & Co. in taking the course that was taken; but that they were both actuated by a legitimate desire to obtain satisfaction of the judgment; and though the correspondence shews that they were endeavouring to persuade the plaintiff to submit to an interlocutory judgment in the second action in consideration of their putting off the full execution of the writs in the first action, and actually staying the sheriff's hands whilst these negotiations were proceeding, I fail to see any evidence of malice in their conduct. On the contrary, I think it shews a desire not to be harsh in the matter and a willingness to incur some risk of losing the fruits of the judgment as long as there was a chance of an agreement being come to which should prevent the necessity of troublesome litigation in the second action—a litigation which Dangar & Co. and Hollams & Co. as their advisers had a perfect right to endeavour to prevent. I see nothing at all unreasonable in the terms proposed by Messrs. Hollams in their letters of April 22 and 24. Messrs. Bramall's letter of April 28 itself speaks of Lee's

(1) 8 M. & W. 249.
(2) 1 H. & N. 725.
(3) 2 C. & J. 86.
(4) 6 Taunt. 370.

endeavouring to obtain the consent of his creditors to those proposals. In the meantime they, Bramall & Co. and Mr. Lee, were engaged in obtaining the money which paid out the City execution.

I come now to the subsequent proceedings which were relied upon as evidence of malice against Dangar & Co. and Hollams & Co. It was contended that after the City execution had been paid off on April 30 the letter of Hollams & Co. to Nathan & Co. requesting them to withdraw "on payment of the costs of the execution and the sheriff's and their" (Nathan & Co.'s) "charges" amounted to an order to Nathan & Co. not to withdraw unless those payments were made. I cannot put this construction upon the letter, though it was afterwards relied upon by Nathan & Co. as justifying them in afterwards refusing to withdraw unless a sum of 63*l.* 2*s.*, which included 60*l.* odd for poundage, was paid. All that the letter can fairly, in my opinion, be construed to mean is that Nathan & Co. are to withdraw their man upon payment of all proper charges, whether costs of execution or charges, if any, due to themselves or the sheriff. It was argued that "poundage" is a sheriff's charge. That is so, no doubt; but I do not think that Hollams & Co.'s letter can be construed to mean, "We insist on your exacting poundage or any other sheriff's charge, whether legally due or not, before you withdraw your man."

It was argued on behalf of all the defendants that poundage was in fact payable under the county execution. I am clearly of opinion that it was not, the City execution having, in fact, been the only writ on which the amount of the judgment was levied within the decision of *Mortimore* v. *Cragg* (1), and the other cases decided upon this question. The law upon this point is well stated by Cave, J., in the case of *In re Ludmore* (2) as follows: "As a general proposition of law it is undoubted that a sheriff is entitled to poundage when he has obtained some money for the execution creditor by operation of law, whether he gets it by selling the goods he has seized or by the debtor or some one on his behalf paying him out to prevent a sale. But no case can be found in which it has been held that a

(1) 3 C. P. D. 216. (2) 13 Q. B. D. 417.

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sheriff is entitled to poundage until he is in that position." *Bissicks* v. *Bath Colliery Co.* (1) went so far as to allow the poundage even before actual seizure, but only in the case where the handing of the writ to the sheriff had produced money on account of the judgment. But it by no means follows that the mere insertion of the words "sheriff's charges" in the letter is a direction to the sheriff's officer to insist on any illegal charge, and I do not think that there is any evidence that Dangar & Co. or Hollams & Co. intended any illegal claim to be insisted upon. The case of *Crozer* v. *Pilling* (2), where it was held that the refusal to sign the discharge of a defendant in custody under a ca. sa. on payment of the debt and costs is primâ facie evidence of malice, is, in my opinion, no authority for holding that such words as those in Messrs. Hollams' letter are any evidence of malice in this case; and even if it were primâ facie evidence I think that the facts entirely rebut any such presumption. For these reasons, I think that the case against Dangar & Co. and Hollams & Co. entirely fails on the grounds that they were no party to any illegality of any kind, and that there is no ground for imputing to them that they were actuated by any unfair motive from first to last.

As regards the case against Nathan & Co., it was admitted that there was no ground for imputing malice to them; but it was contended that they had brought themselves within s. 29 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), first by demanding the poundage, and secondly by demanding the sum of 2*l.* 7*s.* 6*d.*, after it was known to them that the full amount of the execution had been levied on the writ issued into the City. It was also contended that they were trespassers ab initio in consequence of their so remaining in possession. With regard to the latter contention, I think that it involves an inaccurate use of the expression "trespasser ab initio." But as explained in the cases of *Playfair* v. *Musgrove* (3), and *Ash* v. *Dawnay* (4), a fresh trespass is committed every day by the sheriff or his officer who remains in possession after a reasonable time from the time when he ought to withdraw. In the present case I think that it was

(1) 3 Ex. D. 174.
(2) 4 B. & C. 26.
(3) 14 M. & W. 239.
(4) 8 Ex. 237.

unreasonable for him to remain in possession until May 2, which was the day on which the man in possession was, in fact, withdrawn, unless it could be shewn that the 2*l.* 7*s.* 6*d.* which he claimed and received before withdrawing was made up of items chargeable to the execution debtor in the execution. But the 2*l.* 7*s.* 6*d.* was made up of payments which, in part at least, were payable, not by the execution debtor, but by the execution creditor; for this was, in my opinion, clearly a case in which the execution was "withdrawn," and the order as to fees under the Sheriffs Act, 1887, provides that, "In every case where an execution is withdrawn the fees under this order shall be paid by the person issuing the execution." I think, therefore, that the time from which to reckon as regards an unreasonable remaining in possession dates from May 1, when Nathan & Co. were informed of the payment to the City sheriff, and the evening of May 2, when the man was actually withdrawn. I think that this delay was unreasonable and that Nathan & Co. ought to have withdrawn on May 1 instead of May 2; but, though I cannot hold this delay to be reasonable, I do not think that the mere delay of a day would give the plaintiff any substantial cause of action against the defendants, Nathan & Co., unless there were evidence of some actual damage sustained by the plaintiff in consequence. Of this I think there is no evidence whatever; and, looking at the whole facts of the case, I come to the conclusion that the plaintiff really suffered no damage at all. I think, therefore, that though according to strict law Nathan & Co. were liable in trespass for this delay, I shall be doing justice by assessing the damage at a nominal sum, and I assess them at one farthing.

I come now to the most important part of the case, so far as the sheriff is concerned, viz., the claim to a penalty of 200*l.* for extortion in demanding the 60*l.* 14*s.* for poundage, which I have already explained was not due, and afterwards in demanding and receiving the 2*l.* 7*s.* 6*d.*, which, or at least a portion of which, was, as I have explained, not a charge upon the plaintiff as execution debtor. I should have had more difficulty in deciding this point, owing to the very inartificial way in which the Act of 1887 is worded, but for the decision in the case of *Woolford*

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v. *Levy*, of which a shorthand note was produced and read upon the argument. That case was decided by Cave, J., on June 17 last, and puts a judicial construction by which I am bound on s. 29 of the Act 50 & 51 Vict. c. 55, sub-s. 2 (*b*), which is the provision relied upon by the plaintiff as authority for the claim of 200*l*. The case not being as yet reported, I will read from the shorthand notes what Cave, J., says:—

"Has there been any 'demand' within the meaning of the section? That depends on whether 'demands' in the section refers to a demand of fees by the sheriff as a condition of doing the work which he is bound to do, or a claim after the work has been done to retain certain of the moneys levied as and by way of fees. The present Act is a consolidation act, and provisions somewhat similar to those of s. 29 appear to be found in 29 Eliz. c. 4, 7 Wm. 4, and 1 Vict. c. 55, s. 3, and it is said in *Woodgate* v. *Knatchbull* (1), by counsel, that the mischief intended to be remedied by the Act of Elizabeth was the negligence of sheriffs in executing process, and persons who had recovered judgment being obliged to pay money to sheriffs in order to induce them to do their duty properly in levying the sums recovered. However this may be, the section is a highly penal one, and when the word 'demands' may be satisfied by holding that it applies to a demand for an extortionate fee as a condition of doing the work, I cannot think I am contravening the Act in holding that it does not apply to a mere claim subject to taxation, which it is obvious from the correspondence and from what afterwards took place was what was intended here."

I think that, applying that judgment to the present case, there is no ground for thinking that the legislature intended such highly penal consequences to flow from such conduct as that proved in the present case, as those to which Messrs. Nathan & Co. would be liable in the alternative, if they were held liable to the penalty for two mere blunders, one immediately retracted, such as they committed in the present case. On the whole, though I give judgment for the plaintiff for one farthing on the claim for trespass, I am of opinion that there was no really substantial ground for the present action against any of the

(1) 2 T. R. 148.

defendants, and I give judgment for the other defendants with costs, and judgment for the plaintiff as against Nathan & Co. for one farthing without costs.

Solicitors for plaintiff: *Bramall & White.*

Solicitors for defendants, Dangar, Grant & Co., and defendants in person: *Hollams, Sons, Coward, & Hawksley.*

Solicitor for defendants, Nathan & Co.: *Burchell.*

H. D. W.

SHOPPEE *v.* NATHAN & CO.

1892

Jan. 12.

Sheriff—Extortion—Poundage—Unintentional Overcharge—Liability to Penalty—29 Eliz. c. 4—3 *Geo.* 1. *c.* 15—7 *Wm.* 4, *and* 1 *Vict. c.* 55—*Sheriffs Act*, 1887 (50 *&* 51 *Vict. c.* 55), *s.* 29 *sub-s.* 2 (*b*), (*d*).

The Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29, imposes a penalty on any sheriff's officer "who takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by the Act or any other Act."

Owing to a clerical error made by their clerk, a firm of sheriff's officers claimed and received from an execution debtor a sum for poundage which was 3*l.* in excess of the amount due.

Held, by Collins, J., that the sheriff's officers were not liable in a penalty under s. 29 of the Sheriffs Act, 1887, in respect of such unintentional overcharge.

ACTION tried before Collins, J., without a jury.

The facts and arguments sufficiently appear in the judgment.

Scrutton, for the plaintiff.

McCall, Q.C., and *Germaine*, for the defendants.

Cur. adv. vult.

COLLINS, J. The plaintiff is a solicitor, the defendants are the sheriff's officers for the county of London, and the action is brought for a penalty under s. 29 of the Sheriffs Act, 1887.

The plaintiff and another had been defendants in an action of the *New Oriental Bank* v. *Shoppee and Another*, and judgment for 1714*l.* 15*s.* 11*d.* had been signed by the plaintiffs in that action, and execution for that amount had been put into the office of Mr. Shoppee. Mr. Shoppee, being desirous of paying out

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the execution, wrote to the defendants on April 14, 1891, as follows:—

"Dear Sir,

"*New Oriental Bank* v. *Lefevre and Myself.*

"Kindly let me know the total costs of the levy upon me herein, and oblige

"Yours truly,

"Gerald A. Shoppee."

In answer, a clerk of the defendants called and left with the plaintiff the following document:—

"*New Oriental Bank* v. *Shoppee.*

"The amount payable under this execution is as under:—

	£	*s.*	*d.*
Levy	1714	15	11
Writ	1	2	6
Interest	1	8	4
Levy fee	1	1	0
Mileage			
Poundage	48	8	6
	£1766	16	3

"In addition to above, there is a charge of 5*s.* per day for the man left in possession.

"Payment must be made at the offices of Messrs. Nathan & Co., 27, Chancery Lane, W.C., between the hours of ten and four, the man in possession having no power or authority to receive same." In this document the poundage is stated as 48*l.* 8*s.* 6*d.*, and the words "payment must be made at the offices of Messrs. Nathan & Co." are printed.

On the next day, the 15th, the plaintiff called and saw Mr. J. B. Nathan, and thinking, as he said, that 48*l.* 8*s.* 6*d.* was a large sum, asked if it was correct. The plaintiff seems to have been under the impression that the poundage should be calculated on the value of the goods seized, and not upon the amount of the debt. Mr. Nathan referred to a book and told him the

amount was correct. The plaintiff thereupon paid the whole sum and left the office. This was about 4 P.M. About an hour later a clerk from the defendants called on the plaintiff and told him that, through a mistake, 3*l.* too much had been charged for poundage and that he had brought that sum with him. The plaintiff, for reasons which are not material to the present action, declined to attend to the matter then, and on the same evening the defendants wrote the following letter, inclosing a cheque for 3*l.*

"Dear Sir,

"*New Oriental Bank Corporation, Limited* v. *Yourself.*

"As explained to you this afternoon, we have miscalculated the poundage to the amount of 3*l.*, for which we now beg to enclose you cheque.

"Kindly acknowledge receipt, and oblige,

"Yours faithfully,

"Nathan & Co."

This was answered by the plaintiff's solicitors by a letter of April 16, returning the cheque:—

"Gentlemen,—We are instructed by our client, Mr. G. A. Shoppee, of 7, Furnival's Inn, to apply to you for 3*l.* excessive levy made by you, and 200*l.* which has, under the Sheriffs Act, 1887, become due from you to him in respect thereof, with 100*l.* for damages and 5*s.* for costs of this letter. Failing payment, proceedings will at once be commenced against you to recover the above.

"As it cannot be taken in satisfaction, we think it best to return herewith your cheque for 3*l.* that accompanied your letter to our client dated yesterday.

"Yours obediently,

"Valpy, Chaplin, & Peckham."

To this the defendants replied:—

"Dear Sir,—We are quite at a loss to understand your letter, as Mr. Shoppee is well aware that the error in our figures was discovered by us and the 3*l.* tendered to him within half an hour of payment of the execution by our clerk, to whom he stated

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that, as he had already made an affidavit and issued a summons for recovery of half the amount paid against his co-defendant, he would be obliged by our returning the amount then tendered by cheque so that he would be able to explain.

"The mistake was made by our clerk in calculating the poundage.

"Yours faithfully,

"Nathan & Co."

It was proved to my satisfaction that the mistake arose through a slip on the part of the clerk in writing 48*l.* instead of 45*l.* after the true sum, viz. 45*l.*, had been correctly calculated.

The question is whether, upon the facts above stated, the defendant is liable to forfeit 200*l.* under s. 29 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55). The material parts of that section are as follows:—

"(2.) If any person, being either a sheriff, undersheriff, bailiff, or officer of a sheriff, or being employed in levying or collecting debts due to the crown by process of any court, or being an officer to whom the return or execution of writs belongs, does any of the following things, that is to say,

* * * * * *

"(*b.*) takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of this or any other Act; or

* * * * * *

"(*d.*) Is guilty of any offence against or breach of the provisions of this Act, or of any wrongful act or neglect or default in the execution of his office, or of any contempt of any Superior Court;

he and any person procuring the commission of any such offence shall, without prejudice to any other punishment under the provisions of this Act, but subject as hereinafter mentioned, be liable

"(i.) To be punished by the Court as hereinafter mentioned, and

"(ii.) To forfeit two hundred pounds, and to pay all damages suffered by any person aggrieved,

and such forfeiture and damages may be recovered by such

person as a debt by an action in Her Majesty's High Court of Justice."

Since this case was heard before me, a decision of Denman, J., upon facts not perhaps quite so favourable to the officer, has been reported, viz., *Lee* v. *Dangar, Grant & Co. and Others* (1), and it would therefore perhaps be enough for me to say that the case is concluded by authority. As, however, before I saw the report of that decision, I had arrived at the same conclusion by a somewhat longer road, I think it better to state my own reasons. The case before Denman, J., was decided wholly upon the authority of *Woodford's Trustees* v. *Levy*, in which Cave, J., held that a claim made by a sheriff for excessive charges, not as a condition of levying, but after a levy had been made and which charges were subject to taxation, was not a demand within the section under discussion. He seems to have considered that "demands" in this section refers only to demands made as a condition of doing the work. In that case there had, as he points out, clearly been no taking, as the plaintiff had insisted on taxation, and had not paid the excessive charge. In *Lee* v. *Dangar, Grant & Co. and Others* (1), Denman, J., treated the above decision as covering a case where after a levy the sheriff had not only claimed but had actually deducted against the execution debtor and been paid certain charges which were payable, not by the execution debtor, but by the execution creditor.

In the present case, were the matter free from authority, it would not be necessary to decide whether an excessive charge deliberately claimed after execution levied is covered by the word "demands" in the section, or, if it be in fact paid, by the word "takes." In the case before me there was no intentional demand of any sum other than the fee allowed by the Act. It is not even a case of a claim based upon a bonâ fide but erroneous notion of the sheriff's true legal rights. The officer was under no misconception whatever as to his rights, and the excessive claim was the result of a mere clerical error. The question I have to decide is whether such a claim or taking as this is within the statute.

The statute repeals a long series of enactments relating to

(1) Ante, p. 231.

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sheriffs and consolidates the law into one Act. The words "directly or indirectly" are taken from 29 Eliz. c. 4; the provisions for treating wrongful acts as contempts are adapted from 7 Wm. 4, and 1 Vict. c. 55; while the words "on any pretext whatever" are an expansion of "on pretence of levying" in 3 Geo. 1, c. 15. The 29th section treats all the acts enumerated therein as offences, and proceeds to mete out different penal consequences. No distinction is drawn between the act which may ground a civil remedy and that which is punishable as a misdemeanour. Every one of the persons named who is guilty of an offence against or breach of the provisions of the Act commits a misdemeanour, and taking or demanding under the circumstances named in sub-s. 2 (*b*) is treated and described as an offence, and is therefore a misdemeanour. It would seem, therefore, that the legislature did not intend to visit with the penalty mentioned in clause (ii.) any act which could not be made the subject-matter of an indictment. Does, then, this statutory misdemeanour differ essentially from that which was a misdemeanour before the Act, and was an improper motive an essential of such a crime?

Extortion, whether by a sheriff or any other officer, was a misdemeanour at Common Law: see Comyn's Digest, title "Extortion," and *Smythe's Case.* (1) The Statute (1, c. 26) of Westminster, which in terms forbade it, merely affirmed the Common Law: see Hawkins' P. C. bk. 1, c. 68; Coke 2, Inst. 209; and subsequent statutes, though, while bestowing upon the sheriff a right to take fees which he did not possess at Common Law or by the Statute of Westminster, they reiterated the prohibition to take any other than the permitted fees, did not further define the offence of extortion. Extortion is defined to be "in a large sense any oppression under colour of right. In a strict sense the taking of money by any officer by colour of his office, either where none at all is due or not so much is due, or where it is not yet due" (Hawkins' P. C. ibid.). And whether the prohibition is imposed by statute or by the Common Law, it would seem that the essential elements of the offence must be the same. It seems quite clear that the crime of extortion was

(1) Palm. 318.

not committed unless some improper motive, or at all events intention, to do the wrong actually done was proved. In *Lake's Case* (1), where the Commissary Register and Apparitor of the Bishop of Canterbury, accepted and received 11*s.* 6*d.* instead of 2*s.* 6*d.* as the price of absolution, it appears that the indictment contained the word "malitiose," and therefore could not have been supported by proof of an unintentional overcharge based on a clerical error such as in the present case. In *Rex* v. *Eyres* (2), a case against churchwardens, the indictment contained the words "false, corrupte, and extorsive," and in *Reg.* v. *Clerk of the Peace of Cumberland* (3), Holt, C.J., commenting upon the absence of the words "colore officii, extorsive, &c.," from the articles in writing before him, says, "Extortion is a specific offence, and is as necessary to be set forth as 'felonice' in an indictment." Sir James Stephen makes improper motive a term in his definition of the offence: see Digest of Criminal Law, art. 119. It is, I think, quite clear, therefore, that the defendant in this case could not have been convicted of extortion before the Act of 1887.

Was there then before that enactment any difference in the facts required to be proved in order to establish a claim to a penalty or damages from those which would have supported an indictment for the offence? I think not. It is true that the same facts did not ground the same rights, civil and criminal, against the same parties, for the sheriff though liable civilly, was not liable criminally for the act of his officer: see *Woodgate* v. *Knatchbull* (4) and cases there cited; but the distinction rested not in the quality of the act in respect of which the action was brought, but on the principle that a man will not be held criminally responsible for something which he did not himself do or cause to be done, though he may be responsible in damages for the civil wrong done by his officer. But the wrong remains the same whoever may be responsible for it. In *Woodgate* v. *Knatchbull* (4), which was an action for treble damages under 29 Eliz. c. 4, "an Acte to prevent Extorcion in Sheriffs, &c.," the action is treated by counsel and Court throughout as one of

(1) 3 Leon. 268.
(2) 1 Sid. 307.
(3) 11 Mod. 81.
(4) 2 T. R. 148.

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extortion, and no distinction is suggested between the facts which would ground the civil and the criminal proceeding. I am not, of course, speaking of a mere claim to recover back the excess which rests upon different considerations, but of the civil or quasi civil proceeding to recover the penalty or damages in the nature of a penalty. The Act of 7 Wm. 4, and 1 Vict. c. 55, which enabled the Courts of Westminster to commit as for contempt the sheriff or officer "who shall extort, demand, take, accept, or receive" any other than the permitted fees, supports the same view, since no Court would treat a mere unintentional act as a contempt.

Has, then, the present statute altered the law in this respect, so as to render the defendant liable to a penalty for the clerical error of his clerk? I am of opinion that it has not. The Act purports to be a Consolidation Act, and the words of s. 29 on which the question arises are nearly all culled from the repealed statutes. It deals with one and the same class of acts as constituting misdemeanours, and as grounding a claim for penalties or being the subject of proceedings for contempt. The words, moreover, themselves, "on any pretext whatever," point to some indirect or improper motive such as would be covered by the words "malitiose," "corrupte," or "extorsive," and seem to exclude a mere innocent mistake in calculation. On these grounds, my judgment must be for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Valpy, Chaplin, & Peckham.*
Solicitor for defendants: *H. A. Graham.*

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.
1891
Nov. 14.

BAUMVOLL MANUFACTUR VON SCHEIBLER *v.* GILCHREST & CO. AND ANOTHER.

Ship—Charterparty—Bill of Lading—Liability of Owner of Chartered Ship—Principal and Agent—Master—Registered Managing Owner.

The owner of a ship, who was also registered as managing owner, chartered her for a period of four months, and concurrently agreed to sell her to the charterer on certain terms, the sale to be completed on the expiration of the charterparty. It was provided by the charterparty that the captain, officers, and crew (with the exception of the chief engineer) should be appointed and paid by the charterer, and they were in fact so appointed and paid. The chief engineer might be and was appointed by the owner, who was to pay for the insurance of the vessel and to maintain her in a thoroughly efficient state in hull and machinery for service, the charterer paying all other charges. The charterparty reserved to the owner sufficient space for ship's officers, crew, tackle, and stores; and it was also thereby provided that the captain should be under the orders of the charterer, and that the charterer should indemnify the owner from all liability arising from the captain signing bills of lading. The plaintiffs shipped on board the vessel certain bales of cotton under bills of lading, some of which were signed by the captain, and the rest by a firm of shipping agents who acted as the charterer's agents at the port of shipment. Neither the captain nor the shipping agents had any authority to sign bills of lading on behalf of the owner. This fact was not known to the plaintiffs, who had no knowledge that the ship was under charter. The cotton having, during the currency of the charter, been lost at sea by reason (as was alleged) of the unseaworthiness of the vessel, the plaintiffs sued the owner for the loss:—

Held, reversing the judgment of Charles, J., that the intention and effect of the charterparty was that the owner parted with the possession and control of the vessel to the charterer, and that provisions that were not consistent with this intention might be disregarded; that, consequently, the captain was not in fact, nor could he be taken to be, the servant of the owner; and that as neither the shipping agents nor the captain were the agents of the owner, he could not be liable either under the bills of lading, or for any alleged negligence of the captain in taking the vessel to sea in an unseaworthy condition, or by reason of his being registered as managing owner.

APPEAL from the judgment of Charles, J., reported [1891] 2 Q. B. 310, on the trial of a preliminary question in the action.

The action was for damages for the loss of cotton, shipped by the plaintiffs on board the SS. *Sultan*, in December, 1888, at New Orleans, to be carried to Bremen and there delivered to them. It was alleged by the plaintiffs that the loss was attributable

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BAUMVOLL MANUFACTUR VON SCHEIBLER v. GILCHREST & Co.

to the unseaworthiness of the ship; but a preliminary question was raised on the pleadings whether, assuming that the goods were lost as stated in the statement of claim, the defendant Furness or the defendants Gilchrest & Co., or either of them, were liable. The facts are fully set out in the written judgment of the learned judge. Stated briefly, they were as follows: An agreement was made between Furness and his co-defendants, Gilchrest & Co., on behalf of a proposed new company, for the sale of the ship to the company, partly for cash, and the balance of the purchase-money on transfer of the ship at the expiration of a charterparty entered into on the same day and by the same parties. The charterparty, which was to be in force for four months, is set out in full in the report of the case below. Gilchrest & Co. at once took possession, and the vessel sailed for New Orleans. Meanwhile Furness had been registered as owner, and his name and address as "managing owner" were registered under the provisions of 39 & 40 Vict. c. 80, s. 36. At New Orleans the plaintiffs shipped the cotton, which was afterwards lost, under bills of lading which did not refer to any charterparty, some signed by the master and others by Ross, Keen & Co., who were the agents for Gilchrest & Co. The plaintiffs had no knowledge or notice of the charterparty or of the relations which existed between Gilchrest & Co. and Furness. The loss took place while the charterparty was in force. The captain, officers, and crew, with the exception of the chief engineer, were appointed by Gilchrest & Co., and Furness exercised the right, given him under one of the clauses of the charterparty, to appoint the chief engineer.

The learned judge gave judgment for the plaintiffs (1) against both defendants.

The defendant Furness appealed.

J. G. Barnes, Q.C., and *Synnott*, in support of the appeal. The liability of Furness must depend on whether the captain of the ship was his servant. It is clear from the facts that he was not. The charterparty was mere machinery for carrying out the contract for sale, and many of its provisions are inconsistent with

(1) [1891] 2 Q. B. 310.

that contract. These clauses must be rejected, and then it will appear that Gilchrest & Co. had the entire possession and control of the ship. If Furness neither appointed the master nor controlled the ship, there could be no holding out of the captain as his agent. The cases which were relied on in the Court below are either cases of bills of lading signed by the charterers as agents for the owner and by his authority: *Hayn* v. *Culliford* (1), or of a master appointed by the owner who is in possession of the ship: *The St. Cloud* (2) and *Sandeman* v. *Scurr* (3); *Boucher* v. *Lawson*. (4) The case of a ship which is demised is treated as an exception from the general rule that the owner is liable for the negligence of the master, and this is because the owner has parted with the possession and control of the ship. That reasoning applies equally to the present case. The cases are uniform to shew that the liability of the owner depends on his having the possession and control of the ship through his servant: *Briggs* v. *Wilkinson* (5); *Reeve* v. *Davis* (6); *Fenton* v. *City of Dublin Steam Packet Co.* (7); *Frazer* v. *Cuthbertson*. (8) The fact that Furness is registered and managing owner can make no difference.

Sir W. Phillimore, and *Stubbs*, contrà. If Furness had intended only to have security for the purchase-money, he would have been content merely with a mortgage of the ship. The charter-party shews that he required more than that and intended to remain owner. There was a combined contract for the hire and the purchase of the ship, and under it the possession of the ship was not given up to the charterers, but the owner retained the right of access to the ship for various purposes. He was entitled to appoint the engineer and was bound to maintain the ship in an efficient state in hull and machinery. Under these circumstances, the shippers have a right to conclude that the captain signed bills of lading as agent for the owner. Independently of the bill of lading, the plaintiffs could maintain an action for breach of warranty of the seaworthiness of the vessel. Further, Furness was not only owner, but he was registered managing owner under 39 & 40 Vict. c. 80, s. 36.

(1) 3 C. P. D. 410; 4 C. P. D. 182.
(2) Br. & Lush. 4.
(3) Law Rep. 2 Q. B. 86.
(4) Cas. temp. Hardw. 85.
(5) 7 B. & C. 30.
(6) 1 A. & E. 312.
(7) 8 A. & E. 835.
(8) 6 Q. B. D. 93.

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No case can be found in which the shipper of goods has failed in an action against the owner for the loss of his goods if notice of the charterparty has not been brought home to him.

[They cited *Newberry* v. *Colvin* (1); *The Great Eastern* (2); *Steel* v. *Lester* (3); *European Co.* v. *Royal Mail Co.* (4)]

LORD ESHER, M.R. The first question in this case is, What was the relation between the defendant Furness and the other defendants with regard to this ship? That appears from two documents, the agreement and the charterparty, and when these are considered it is, in truth, plain enough. Gilchrest & Co. wanted to buy a ship, and there was brought to their notice a Spanish ship. They do not appear to have had the money to pay for it, and they applied to Furness for help in the transaction. Thereupon it was arranged between them that Furness should buy the ship and should agree to sell her to Gilchrest & Co. The first document is a contract for the sale of the ship to Gilchrest & Co., and it amounts to this: Furness was to buy the ship, and, as she would be wanted to be used as a British ship, she was to be registered in his name as a British ship. Further, he was to agree to sell her to Gilchrest & Co.; but as they were not ready to pay the price, the ship was to be his for four months, and was to be chartered to Gilchrest & Co. at 750*l.* a month, and they were to pay a part of the purchase-money as a first instalment. So that as between Furness and Gilchrest & Co. the ship was Furness's ship. One man could not sell a ship to another so that the latter became owner and yet charter the ship—that would be for a man who is not owner to charter to one who was. So that the case must be considered on the footing of Furness being the owner, and he was moreover registered as owner and as managing owner.

Then there is the contract contained in the charterparty. We must look at that and construe it subject to the condition in which they stood at the time with regard to the purchase of the ship, and the intention of the parties as disclosed upon the face of it. We have a right to look at what is written into the printed form and at what is struck out. Looking at all these

(1) 7 Bing. 190; 1 Cl. & F. 283.
(2) Law Rep. 2 A. & E. 88.
(3) 3 C. P. D. 121.
(4) 4 K. & J. 676.

matters, it seems obvious to me that by the charterparty possession and control of the ship were given to Gilchrest & Co. for four months, and at the end of that time the ship was to be theirs on payment of the balance of the purchase-money. In order that they may have possession and control for the four months, Furness divested himself of possession and control. Gilchrest & Co. were to appoint the captain and crew and pay them; they could order the ship wherever they chose, and had the power of making whatever contracts with regard to her they chose; and as between themselves and Furness they undertook all the risks that the ship might run on the voyage; and there is no doubt they would have to do any repairs that might be necessary in the course of the employment of the ship by them. At the end of the four months if they did not pay Furness he would be unpaid vendor, and during the charterparty he would be owner of the ship, and so he was to insure the ship, and he would have interest enough, as I apprehend, under those circumstances to enable him to do so. The ship was his security not only for the charterparty freight, but for the balance of the money under the contract for sale; and therefore he stipulated that he should nominate the engineer, who was to be the servant of the charterers, who were to pay him and to have power to dismiss him.

I have come, therefore, to a conclusion contrary to that of Charles, J. There are stipulations in the charterparty which ought to have been struck out if the parties had been careful. They would be evidence by themselves that Furness had retained possession of the ship; but, taken with the rest of the stipulations, they must be treated as inefficient, and must be disregarded in a contract which is a giving up by Furness and a giving over to the charterers for four months of the whole and absolute possession and control of the ship.

That being so, then comes the question whether the plaintiffs have any right of action against Furness. The first cause of action that they allege is for breach of bills of lading, and secondly, they allege negligence in sending the ship to sea from New Orleans in an unseaworthy condition. It is not sufficient breach of a bill of lading that the ship went to sea in an

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unseaworthy condition; but it must also be shewn that the unseaworthiness was the cause of loss; but for the purpose of this case I will assume that is proved.

Now, with regard to the bills of lading, the question arises, With whom were the contracts made? They were in fact made between the plaintiffs and Messrs. Ross, Keen & Co. or the plaintiffs and the captain. Ross, Keen & Co. and the captain were agents of somebody and authorized to sign the bills of lading. By whom were they authorized? It is clear they were authorized by Gilchrest & Co. and not by Furness, and that he had nothing to do with the bills of lading and no interest in them or knowledge of them. But it is said that the captain must be taken to have been the agent of Furness in signing the bills of lading. If the captain was the captain of Furness, the owner, then I think that any shipper who takes a bill of lading signed by the captain without knowledge of any charter-party, which hands over the right to make a bill of lading to the charterer, and to the captain as his agent, would have a right to assume against the owner that the captain had the ordinary authority to sign bills of lading and would have a right to sue the owner. I think that is right law; but it only applies where the captain is the captain of the owner, and is not applicable where this is not the case.

The question then arises, When is the captain the owner's captain? He is the owner's captain if the owner appoints him and exercises authority over him, or has a right as between themselves to exercise that authority over him which an owner has ordinarily to exercise over his captain. I say "as between themselves," because the owner may have given a right to the charterer inconsistent with his exercise of that authority. Still, if the captain is the servant of the owner, appointed by him on ordinary terms, the captain cannot say, "You have no right to order me to do anything; you have transferred that right to someone else." He cannot say that because he is the owner's servant, and the owner would have a right to dismiss him immediately if he did not obey his orders.

Then was this captain the captain of the owner? It seems to me, after listening to all the cases that have been cited from the

time of Lord Ellenborough downwards, that through all the cases it has been assumed that the question depends, where other things are not in the way, upon this: whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or a demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship; and in such case the captain is not the captain of the owner, and if so he has no authority to bind the owner by any bill of lading or by any contract. I have said that this appears to me to go through all the cases, and I have pointed out passages in them all, beginning with the case of *Frazer* v. *Marsh* (1), decided by Lord Ellenborough when sitting in banco. There Lord Ellenborough uses an expression which I think is the right one. He does not speak of "demise," but of "control and possession," for he says, "to say that the registered owner, who divests himself by the charterparty of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by the order of the captain during the time, would be to push the effect of those acts much too far."

I do not intend to go through the cases; but it seems to me they are all to the same effect. Therefore, it seems to me there cannot be any liability of Furness upon the bills of lading.

If it is said that the captain was negligent in taking the ship to sea, or in keeping her at sea in an unseaworthy condition, the question still arises, How can Furness be made liable unless the captain was his servant? It is impossible that a man who is not negligent in fact can be held liable for the negligence of another who is not his servant. If, then, the captain was not the captain of the owner, it is impossible that the liability can attach. In the case which was cited of *Hayn* v. *Culliford* (2), as determined by Lord Bramwell when he was a

(1) 13 East, 238.

(2) 4 C. P. D. 182.

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judge of the Court of Appeal, it is obvious from the dilemma which he put, making the defendants liable either under the bill of lading or for negligence, that this must have been put on the assumption that the captain was the captain of the owner.

Then it is said that the Act of Parliament as to registration of a managing owner altered the law and gives a contractual right which did not exist before. The Act was passed for a particular purpose—to insure the safety of people who go on board ships—to insure that the ship should be safe; and it puts certain liabilities for that purpose on the person who is the ship's manager and prevents his saying, when those liabilities arise, that he is not managing owner. It is impossible, to my mind, to construe the Act as altering contractual relations or altering the general law so as to make the registered managing owner liable for the acts of one who is not his servant. This view is borne out by the judgment of Bowen, L.J., in *Frazer* v. *Cuthbertson* (1), who there dealt with this point, and said: "The 36th section of the Act nowhere creates new agents, new functions, new capacities, nor clothes existing agents with enlarged powers. The section is part of the machinery designed to secure adequate protection for lives and property at sea," and, further, "a managing owner registered under the Act is no more and no less than a managing owner before the Act. He binds those whose agent he is; he binds nobody besides."

The conclusion I come to is, that neither in respect of the contracts on the bills of lading, nor in respect of negligence, nor by virtue of his being registered owner, is the defendant Furness liable to the plaintiffs. That is the question which was to be tried, and I must disagree with Charles, J., in the conclusion to which he came. The appeal will, therefore, be allowed, and judgment entered for the defendant Furness.

LOPES, L.J. It is sought in this action to make Furness, one of the defendants, liable on the bill of lading. That entirely depends, according to my view, upon whether the master of this vessel was the servant of Furness or of the charterers.

I am of opinion that he was not the servant of Furness but of

(1) 6 Q. B. D. 93.

the charterers. I do not propose to go through the evidence; but, putting the matter shortly, I ground this conclusion on these facts: the charterers appointed him; the charterers paid him; the charterers alone could dismiss him.

It seems to me to result from the cases that if the master is in possession of the ship as servant of the owner, a shipper who puts his goods on board and takes a bill of lading from the master in ignorance of any charterparty is entitled to regard the owner as the person who contracts to carry the goods, and may sue him for breach of contract. But that entirely depends upon whether the master is the servant of the owner; and, as I have already said, I have arrived at the conclusion that the master here was not the servant of the owner; and Furness, therefore, cannot be made liable on that proposition of law.

Another proposition which is the result of the cases is this: if a charterparty is such as to give the charterer possession of the vessel as well as the right to use her carrying capacity so that the vessel is in effect let to him, and the master in charge of her is his servant, then the owner is not in the position of a carrier, either as regards the charterer or any one else; and there is no reason for regarding the master as presumptively his agent in contracting with the shippers. It appears to me that Furness here actually parted with the possession and the control of this vessel, and, therefore, from this point of view also, cannot be held liable.

But it was contended that the absence of notice of the charterparty to the shipper was sufficient to make the owner liable, notwithstanding the fact that the master was actually the servant of the charterers. Now, how does that stand according to the cases? When an owner and a captain stand in the relation of master and servant, the owner of the ship, in absence of notice of a charterparty to the shipper, no doubt holds out the captain as having authority to sign bills of lading on his behalf, but only where such relationship exists. A number of cases were cited, but that is the result of them. The case of *Steel* v. *Lester* (1) was cited as an exception; but I think when that case is examined that it does not controvert what I have

(1) 3 C. P. D. 121.

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said, that in every one of the cases the master was in fact the servant of the owner, appointed and liable to be dismissed by him; and if that is so, that makes a broad distinction between those cases and the present.

With reference to the point as to the registered owner, no doubt the register is primâ facie evidence of ownership, and it has been held also to be primâ facie evidence that the master is the servant of the registered owner; but subject to this—that it may be explained, and it is only primâ facie evidence until the contrary is made out. Here the contrary is made out, and therefore that point likewise fails.

I therefore think that this appeal should be allowed.

KAY, L.J. The position of the parties in this case is a very peculiar one, and perhaps very seldom, if ever, will occur again; but the questions which have been argued are questions of very great and general interest. By two documents, dated on the same day, Furness, who had purchased this ship at the instigation of Gilchrest & Co., sold the ship to Gilchrest & Co. upon the terms that a deposit was to be paid of 500*l.* at once, and a further sum of cash within a certain time, and the remainder of the purchase-money by definite fixed instalments. It appears on the face of the contract that the intention was to deliver the ship over to Gilchrest & Co. to use, and that the contract was not to be completed by an absolute transfer of the ship until the expiration of a charterparty of even date. That explains, to my mind, how it came about that Gilchrest & Co. were to have so large a control of her during the four months of the charterparty. It was contemplated that the ship was eventually to be the absolute property of Gilchrest & Co., and they departed somewhat from the usual form of charterparty, and allowed Gilchrest & Co. to have the absolute control of her during the time which must elapse before the contract was completed. They appointed the master and crew, and the ship sailed under their orders for New Orleans. She seems to have encountered bad weather by the way, and to have been somewhat damaged; and she afterwards left New Orleans with a cargo of cotton shipped there, to which the bills of lading upon which this action is brought relate.

Some of those bills of lading were signed by the master. Some of them, I understand, were not signed by the master, but were signed by Ross, Keen & Co., who were unquestionably the agents of Gilchrest & Co., and with whom Furness had no connection in this transaction. The action is brought, as I understand, on both sets of bills of lading.

It seems to me clear, beyond all possibility of doubt, that the master and Ross, Keen & Co. were the servants or agents of Gilchrest & Co. alone, and were not in any sense whatever the servants or agents of Furness. Then, so far the case is clear; but the stress of the argument in support of the judgment of the Court below has been that even if the master, and I suppose it would be said Ross, Keen & Co., were not in fact the agents of Furness, Furness had held them out as his agents.

The principles as to holding out are the same whatever the holding out be, and in Lindley on Partnership, 4th ed. p. 40, they are thus stated: "The doctrine that a person holding himself out as a partner and thereby inducing others to act on the faith of his representations is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct." And again: "It also follows that no person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, namely, first, the alleged act of holding out must have been done either by him or by his consent, and secondly, it must have been known to the person seeking to avail himself of it."

Let me apply that to this case. Here the persons who took these bills of lading did not know that Furness was the registered owner of this ship. It was said he was also registered managing owner; but they did not know that fact either—they did not know that Furness was the owner of the ship at all. Then how is it possible to say that the mere fact that Furness was on the register as the legal owner of this ship, or that he was on the register as the managing owner, can be a holding out with regard to the persons who took bills of lading from Ross, Keen & Co. or from the master? The conclusive answer is, that they never knew that Furness was the owner at all. It has never been held, that I know of, that either the registration of a

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man as managing owner of a ship or the registration of him as the owner of the legal interest in the ship are such public notice that all the acts of the master, who was not his servant, should on that account be treated as his acts. The facts of this case fall far short of that which would be wanted to create the estoppel which is effected by a man holding out another as his agent when he is not in fact his agent; and for these reasons I agree entirely with the conclusion at which the other members of the Court have arrived.

Appeal allowed.

Judgment to be entered for the defendant Furness.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendant Furness: *Crump & Son.*

A. M.

C. A.

Nov. 10.

[IN THE COURT OF APPEAL.]

MOIR, APPELLANT; WILLIAMS, RESPONDENT.

Metropolitan Building Acts—Surveyor's Fees—Building—Separate Sets of Chambers in a Building—Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *s.* 27, *r.* 2, *ss.* 49, 51, *Sched. II. Part I.*

Fourteen sets of chambers were erected, intended to be tenanted by different persons, and contained in a building exceeding 3600 square feet in area. Each set was separate from the others, and had its own separate entrance door giving access from the street entrance and staircase which were common to all. Adjoining sets were divided in accordance with r. 2, s. 27 of the Metropolitan Building Act, 1855, horizontally by party arches or fireproof floors, and vertically by party walls. The respondent, as district surveyor, claimed a fee in respect of each set of chambers as a separate building. On a case stated:—

Held, affirming the judgment of the Queen's Bench Division, that the separate sets of chambers were not buildings within the meaning of Sched. II. Part I. of the Act, and that the district surveyor was entitled to one fee only in respect of the entire structure.

CASE stated by a magistrate of the metropolitan police courts.

The respondent, the district surveyor for the district of South Kensington, preferred a complaint against the appellant under s. 51 of the Metropolitan Building Act, 1855, for non-payment of fees. The facts proved or admitted at the hearing were as

follows. Fourteen separate sets of chambers or rooms, intended to be tenanted by different persons and contained in a building exceeding 3600 square feet in area, were erected by the appellant, and the entire structure was covered in on October 31, 1889. The notice of the appellant's intention to build was that he intended to erect fourteen new buildings to be used as dwelling-houses in flats, and it gave the area of the "building" and its height and number of stories.

The fourteen sets of chambers had one entrance from the street and one staircase which were common to all. Each set of chambers had its own separate entrance door, giving access from the common entrance and staircase to that particular set of chambers only, there being no means of communication between the separate sets of chambers except by the common entrance and staircase. The separate sets were divided from each other horizontally by party arches or fireproof floors, and vertically by party walls.

During the erection of the fourteen sets of chambers the respondent, in the discharge of his duties as district surveyor, from time to time surveyed and inspected the same, and in April, 1890, he delivered to the appellant a bill specifying the fees which he claimed to be due to him under the schedule to the Act, amounting to 67*l.* 2*s.* 6*d.* In order to arrive at this amount the respondent in the bill treated the various sets of chambers in the building as separate buildings, and claimed fees for each as a separate building.

The magistrate found as facts that the fourteen sets of chambers, although entered from a common entrance or staircase, were isolated and separated from each other, and were contained in a building exceeding 3600 square feet in area, and were intended to be tenanted by different persons, and that each of the sets of chambers was a separate building for the purposes of the Act, and he therefore held that the respondent was entitled to charge a separate fee as and for a new building in respect of each set, and he accordingly ordered the appellant to pay the full amount claimed.

The question for the opinion of the Court was whether this order was right in point of law.

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1891. May 8. *Finlay, Q.C.*, and *Morten*, for the appellant The respondent relies upon s. 27, r. 2, of the Metropolitan Building Act, 1855 (1), as establishing that each flat is a separate building; but the "building" referred to in Sched. II. Part I. of the Act, which deals with the fees payable to surveyors, must be the building covered by the roof, and it is plain from s. 19 that by "roof" cannot be meant the floor of the flat immediately above. So, too, the "area" of the building in Sched. II. Part I. is the area as defined by s. 3, and that definition is inconsistent with the respondent's contention. Sect. 27 is irrelevant, for it deals only with the division of buildings, not with the surveyor's remuneration; the words of rule 2, "if contained in a building exceeding 3600 square feet in area," are clearly in the appellant's favour. Again, the respondent claimed 30*s.* for each set of chambers under Sched. II.; but if he was entitled to that he should have claimed within one month after the roof—i.e., the roof of the particular building—had been covered in: s. 51.

Sir R. Webster, A.G., and *Ram*, for the respondent. In consequence of the provisions of s. 27, r. 2, of the Act, the walls of each set of chambers became party walls, and the floors became party structures, with the result that instead of one survey the respondent had to make fourteen. Many services are required of a surveyor with regard to these structures which are not called for in the case of ordinary houses. Thus, each party wall has to be surveyed: see Sched. I., Part I., rr. 1, 2, 3; and the recesses in such walls must be inspected: s. 13, rr. 1, 2, 3. So, too, with regard to the requirements of s. 15, rr. 2, 3, and ss. 17, 18, and 20, r. 7. Each set of chambers, therefore, had to be inspected just as if it were a separate building.

As to the argument relating to the time for claiming payment of these fees, it does not follow that because "building" in Sched. II., Part I. includes that which is a building by virtue of

(1) 18 & 19 Vict. c. 122, s. 27: "The following rules shall be observed as to the separation of buildings, and limitation of their areas: . . . . (2.) Separate sets of chambers or rooms tenanted by different persons shall, if contained in a building exceeding 3600 square feet in area, be deemed to be separate buildings, and be divided accordingly, so far as they adjoin vertically by party walls, and so far as they adjoin horizontally by party arches or fireproof floors."

s. 27, the word "roof" in s. 51 should have any other than the ordinary meaning.

The merits of the case are with the respondent; for the appellant's building notice—which is primâ facie evidence against him, s. 40—by its terms supports the respondent's contention: "We intend to erect fourteen new buildings," &c. The respondent acted on the faith of that notice. *Power* v. *Wigmore* (1) shews that it is a question of fact to be determined by the magistrate whether the surveyor has been called upon to survey more than one building, and here the magistrate has found the fact in the respondent's favour.

Finlay, Q.C., in reply. The question is not one of quantum meruit, but of a statutory scale of fees.

Cur. adv. vult.

1891. May 12. The judgment of the Court (Lord Coleridge, C.J., and Mathew, J.), was delivered by

Mathew, J. This is an appeal against an order of one of the metropolitan police magistrates made under s. 51 of the Metropolitan Building Act, 1855. The facts are these: The appellant, who is a builder, constructed a large building seven stories in height, and containing fourteen flats or separate sets of chambers. The area of the building exceeded 3600 square feet. When the building was completed, and after the roof was on, the respondent, the district surveyor, sent in his account in respect of fees payable to him by the appellant. The respondent claimed a separate fee for each flat, and the appellant refused to pay this. Thereupon the respondent took out a summons under the above section, and the magistrate decided in his favour, and ordered that the appellant should pay to the respondent an amount of 67*l.* 2*s.* 6*d.* Against that order this appeal is brought.

It has been argued on behalf of the appellant, that under the above Act the district surveyor was entitled to one fee only, and that such fee could not exceed 10*l.*

The provisions as to the fees of district surveyors are contained in ss. 49 to 51 of the Act. Sect. 49 provides that "there shall be paid to the district surveyors in respect of the several

(1) Law Rep. 7 C. P. 386.

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matters specified in the first part of the 2nd schedule hereto, the fees therein specified, or such other fees, not exceeding the amounts therein specified, as may from time to time be directed by the Metropolitan Board of Works; but one fee only shall be chargeable with respect to any such works done in, to, or upon any building as are in pursuance of the provisions hereinbefore contained included in one notice." The schedule referred to provides in Part I., as follows:—

"*Fees for New Buildings.*

For every building not exceeding four hundred square feet in area, and not more than two stories in height..	30*s.*
For every additional story	5*s.*
For every additional square of 100 feet or fraction of such square	2*s.* 6*d.*

But no fee shall exceed ten pounds."

Then by s. 51 it is provided that, "At the expiration of the following periods, (that is to say), of one month after the roof of any building surveyed by any district surveyor under this Act has been covered in . . . the district surveyor shall be entitled to receive the amount of fees due to him from the builder employed in erecting such building . . ." From that section it would appear that there is to be one fee in respect of one building. It is said for the appellant that it is perfectly clear that in this case the respondent is entitled to only one fee. For the respondent, reliance was placed upon s. 27 (2), which enacts that, "separate sets of chambers or rooms tenanted by different persons shall, if contained in a building exceeding 3600 square feet in area, be deemed to be separate buildings, and be divided accordingly, so far as they adjoin vertically by party walls, and so far as they adjoin horizontally by party arches or fireproof floors." It was argued by the Attorney-General that this should be construed as if it were "shall be deemed to be separate buildings for all the purposes of the Act"; and in support of that view he pressed upon us that as by this section such separate buildings are to be divided by party walls or party arches or floors, the burden of the district surveyor's duties as to inspec-

tion was largely increased by this provision. The Attorney-General called attention to ss. 13, 18, and 20, sub-s. 7, as shewing that there was a multiplication of the surveyor's work in the case of buildings of this description, and that, therefore, there must be extra payments to him.

But the strongest answer to this argument is that the learned magistrate has not found as a fact that any additional labour was performed by the respondent. We should not be justified in following the Attorney-General's reasoning unless there were such a special finding in the case. Moreover, the consequence of construing the Act as the Attorney-General asks us to do would be unreasonable. It must be borne in mind that in the instance of an undivided building, however large, the district surveyor can claim only one fee, not exceeding 10*l.*; and that in the instance of a building divided into flats, but which is less than 3600 square feet in area, the fees would be even less than that sum. It is only where the divided building exceeds 3600 square feet that the increased fees could be claimed, even if the view contended for by the respondent were correct; and, therefore, where the building is just under that measurement, the surveyor could not be entitled to more than one fee, whatever the number of flats contained in the building.

In our opinion, the proper construction of s. 27 is that contended for by Mr. Finlay. When one looks at the Act, it is quite clear that these flats are to be deemed separate buildings, not for all purposes, but for the purposes of division. We think, therefore, that the learned magistrate was wrong. and that this appeal should be allowed.

Appeal allowed.
Leave to appeal granted.

P. B. H.

The respondent appealed.

1891. Nov. 10. *Sir R. Webster, A.G.*, and *Ram*, in support of the appeal.

Morten (with him, *Finlay, Q. C.*), contrà.

LORD ESHER, M.R. This is an appeal by a district surveyor whose duty is to survey all buildings within his district. He is

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surveyor for a public body, and can only charge for his work the fees given to him by the Act of Parliament. In the first place, what is it that he has to survey? New buildings, and in some cases works or old buildings. His fees are regulated by Part I. of the 2nd schedule to the Act, which provides, in the case of new buildings, a fee in respect of "every building not exceeding 400 square feet in area, and not more than two stories in height," and additional fees for each additional story and additional area of 100 square feet. If the words "new building" are taken by themselves without reference to the other part of the Act, they would be taken to apply to what is ordinarily called a building. Such an ordinary building is an inclosure of brick or stonework covered in by a roof, and if the schedule were taken alone it is to such an area that it would apply. Is that view assisted by any other part of the Act? The right to be paid a fee is given by s. 49 of the Act, which says that, "there shall be paid to the district surveyors in respect of the several matters specified in the first part of the 2nd schedule hereto the fees therein specified." This does not help in determining what is a building within the scope of the Act; but s. 51 does assist in determining this, for it declares that the district surveyor shall be entitled to receive the amount of the fees due to him at the expiration "of one month after the roof of any building surveyed by any district surveyor under this Act has been covered in." This certainly seems to shew that the expression "building" in Sched. II. is to be read in its ordinary sense as referring to such an area as I have mentioned covered over by a roof. But then let us see if there is anything in the Act which can be said to give a more extended meaning to this expression in some cases. It is said that this is the effect of the state of things described by and dealt with in s. 27. That section deals with the rules that are to be observed as to the separation of buildings and limitation of their areas. The first sub-section is, "Every building shall be separated by external or party walls from any adjoining building." So far, that is consistent with the use of the word in its ordinary sense. Then the 2nd sub-section enacts: "Separate sets of chambers or rooms tenanted by different persons shall, if contained in a building exceeding 3600 square feet in area, be deemed to be

separate buildings, and be divided accordingly, so far as they adjoin vertically by party walls, and so far as they adjoin horizontally by party arches or fireproof floors." This applies to chambers contained in a building, and that expression applying to the whole structure is used, in my opinion, in its ordinary sense. What is being dealt with is the interior of a building, and it is dealt with in order to provide for the safety of its different parts—that is, of the sets of chambers or rooms. The true way to read this sub-section is to say that such separate sets of chambers or rooms are for the purpose of separation from one another to be deemed to be separate buildings—that is, the sub-section is a mere building instruction for the purpose of dealing with interiors, and does not interfere with the meaning to be attached to the word "building" in that section. If so, the section cannot have any effect on the meaning of the word when it is used in other parts of the Act, but leaves it to bear its ordinary meaning. I come, therefore, to the conclusion that the surveyor is only entitled to a fee in respect of a building in the ordinary sense of that word, and I agree with the judgment of the Divisional Court. The appeal will, therefore, be dismissed.

FRY, L.J. The respondent in the appeal to this Court is the owner of a plot of land on which he has erected a structure which comprises fourteen separate sets of chambers. The question is, whether that structure is a single building within the meaning of the schedule to the Act, or whether it is fourteen buildings. I am of opinion that it is a single building. If we consider the schedule without reference to the rest of the Act, we must take the expression "building" to be used in its ordinary sense. We should speak of such a structure as this in the singular as "a building"; thus popular usage is in favour of this view. It is said, however, that the propriety of this interpretation is affected by s. 27. The argument presented to us seems to be that the language in this section gives an interpretation of the word "building," and that, if there is nothing inconsistent with that interpretation in the rest of the Act, it must be adopted throughout. It is said.

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further, that there is nothing inconsistent with this view in the schedule, but that the interpretation is reasonable, because, in such a case as the present, there are matters which increase pro tanto the duties of the surveyor, and so he should be entitled to receive further fees in respect of these extra duties. I do not take that view of s. 27, and I do not think I am at liberty to extend that section, which is a mere rule with regard to internal separation. The section is not a defining or interpretation section, but merely a rule for determining what is to be done in special cases. If I attempt to apply the suggested interpretation of the word "building" to other parts of the Act, I am met by the difficulty that in most cases though not in all, it breaks down. If, for instance, there are fourteen buildings in this structure, the hall and staircase are not included in them, and the area of the whole would have to be determined without them. There are duties in the surveyor with regard to the staircase in a building, and this dilemma arises: either the staircase is a part of the structure, treating it as one building, or else it is outside the fourteen buildings and not part of any of them, so that no duties arise in that respect. The difficulties do not stop there, because if I endeavour to apply the rule as to the time for the payment of fees, which is after the roof has been covered in, there is but one roof, and the time for payment must be independent of the completion of each of the sets of chambers which is said to constitute a separate building. The difficulties do not even stop here; for if we apply this principle to party walls, the thickness of which is determined by Sched. I. Part I., there might, in circumstances which it is easy to imagine, be a party wall diminishing at its top to 13 inches, and on that another party wall of the regulation width of 21½ inches. This result of the proposed interpretation it is incredible to suppose was intended, and I think the points of which I have given illustrations shew that the rule in s. 27 with regard to separation of sets of chambers, does not affect the meaning of the word "building" in the schedule.

LOPES, L.J. I think this case would not be arguable but for s. 27; but I entirely agree that the second sub-section is merely a building instruction for the internal arrangement of sets of

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chambers in one building with a view to their proper security by means of internal divisions. If so, that section cannot affect the meaning to be given to the expression "building" in other parts of the Act. The word is, in my opinion, used in the schedule in its ordinary and usual sense; and in that view I am confirmed by a consideration of the other parts of the Act, and especially of s. 51, which provides that the surveyor is to be entitled to his fees at the expiration of one month after the roof of any building surveyed by him has been covered in. I am, therefore, of opinion, with the other members of the Court, that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *R. J. Bowerman.*
Solicitors for respondent: *Foster & Spicer.*

A. M.

[IN THE COURT OF APPEAL.]

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County Court—Jurisdiction—"Admiralty Cause"—Collision—Action against Pilot for Negligence—31 & 32 *Vict. c.* 71, *ss.* 2, 3, 6; 32 & 33 *Vict. c.* 51, *ss.* 1, 2, 3, 4.

The High Court of Admiralty had no jurisdiction to entertain an action in personam against a pilot in respect of a collision between two ships on the high seas caused by his negligence.

Consequently, a county court has no such jurisdiction under the Acts 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, no greater jurisdiction than that which was possessed by the Admiralty Court being by those Acts conferred on the county courts, except with regard to charterparties.

Everard v. *Kendall* (Law Rep. 5 C. P. 428), and *Allen* v. *Garbutt* (6 Q. B. D. 165) approved.

APPEAL against a decision of a Divisional Court (Wills and Lawrance, JJ.), discharging an order nisi for a mandamus to the judge of the City of London Court to hear and determine an action of *Green* v. *Payne*. The action had been brought by the owners of a barge on the Admiralty side of the City of London Court, against the pilot of a steamer in personam to recover damages resulting from a collision in inland waters, which was alleged to have been caused by the pilot's negligence. The

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Divisional Court held that the City of London Court had no Admiralty jurisdiction in such a case. The plaintiffs appealed.

Cohen, Q.C., and *Pyke*, for the appellants. The question is whether the Admiralty side of a county court has jurisdiction to entertain an action in personam against a pilot for negligence causing a collision between a ship in his charge and a barge in the river Thames. That depends on the question whether this is an "Admiralty cause" within the meaning of the Acts giving Admiralty jurisdiction to county courts. It is contended that the Court of Admiralty always had jurisdiction to entertain an action in personam against a pilot, just as it had in the case of the master of a ship; it always had jurisdiction in respect of torts committed upon the high seas. Courts of Admiralty exercised jurisdiction in personam long before they exercised it in rem. If the Court of Admiralty had this jurisdiction in respect of cases occurring on the high seas, it has it now in cases occurring on the river by virtue of 24 & 25 Vict. c. 10, s. 7: *The Malvina* (1); *Smith* v. *Brown*. (2) There are many authorities shewing that the Court of Admiralty had this general jurisdiction in the case of torts on the high seas: see, per Dr. Lushington, in *The Sarah* (3); see also *The Volant* (4); *The Ruckers* (5); Co. Inst. vol. 4, p. 134; Blackstone's Commentaries, original edition, vol. 3, p. 106; Browne's Law of Admiralty, vol. 2, p. 107; *Caton* v. *Burton* (6); *The Sylph* (7); *Seward* v. *Vera Cruz* (8); *The Franconia* (9); *The Athol* (10); *The Henrich Björn* (11); Williams & Bruce on Admiralty Practice, 2nd ed. pp. 76, 77; *Blount's Case* (12); Bacon's Abridgment, 7th ed. vol. 5, p. 425.

The liability of the owner of a ship for the negligence of his servants is in personam, and the Admiralty Court has jurisdiction: *The Swallow* (13); *The Victor*. (14) There is a remedy in

(1) Lush. 493; Brown & Lush. 57.
(2) Law Rep. 6 Q. B. 729.
(3) Lush. 549.
(4) 1 Wm. Rob. 383.
(5) 4 Ch. Rob. 73.
(6) 1 Cowp. 330.
(7) Law Rep. 2 A. & E. 24.
(8) 10 App. Cas. 59.
(9) 2 P. D. 163.
(10) 1 Wm. Rob. 374.
(11) 11 App. Cas. 270.
(12) 1 Atk. 296.
(13) Swab. (Ad.) 30.
(14) Lush. 72.

personam against the pilot who is in charge of a ship at the time of a collision caused by his negligence, as there might be a personal action in the Admiralty Court against the owner for the negligence of his servants. There is no remedy against the owner when the pilotage is compulsory ; and there is a remedy against the pilot in personam in the Admiralty Court, just as against the master, for his wrongful act: *The Ruckers.* (1) There is a series of old cases shewing the jurisdiction of the Admiralty Court in personam: *Pillans* v. *Sherburne* (2); *Strong* v. *Teesdale* (3); *Cowton* v. *Cocke* (4); *Pigg* v. *Goldsburg* (5); *Taylor* v. *Thompson* (6); *Ewer* v. *Thirkettel* (7); *Wernam* v. *Churchwood* (8); *Russell* v. *Hays.* (9) The last case was an action against a pilot by the master. More recent authorities are: *The Jack Park* (10); *The Agincourt* (11); *The Enchantress* (12); *The Malvina* (13); *The Diana.* (14) The Courts of Common Law had a concurrent jurisdiction. There is nothing in *The Alexandria* (15), and *Flower* v. *Bradley* (16) inconsistent with the former cases except dicta, and they do not bind this Court. In the American case *De Lovio* v. *Boit* (17), Story, J., attributes the most extensive jurisdiction to the Admiralty Court.

But, even if the Court of Admiralty had not this jurisdiction, it has been conferred on the county courts by the Acts which give Admiralty jurisdiction to those courts. Those Acts give jurisdiction, exceeding in some respects that of the Admiralty Court, to the Admiralty side of the county courts. The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, provides that any county court having Admiralty jurisdiction shall have jurisdiction to try "the following causes (in this Act referred to as Admiralty causes) as to any claim for damage to cargo, or damage by collision—any cause in which the amount

(1) 4 Ch. Rob. 73.
(2) Burrell's Adm. C., edited by Marsden, 319.
(3) Burrell's Adm. C. 269.
(4) Burrell's Adm. C. 298.
(5) Burrell's Adm. C. 299.
(6) Burrell's Adm. C. 302.
(7) Burrell's Adm. C. 310.
(8) Burrell's Adm. C. 260.
(9) Burrell's Adm. C. 307.
(10) 4 Ch. Rob. 308.
(11) 1 Hagg. (Adm.) 271.
(12) 1 Hagg. (Adm.) 395.
(13) Lush. 493.
(14) Lush. 539.
(15) Law Rep. 3 A. & E. 574.
(16) 44 L. J. (Ex.) 1.
(17) 2 Gallison, 398.

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claimed does not exceed three hundred pounds." Sect. 21 shews that this jurisdiction is not confined to cases where there are proceedings in rem. By s. 34, the Act is to be "read as one with so much of the County Courts Act, 1846, and the Acts amending or extending the same as is now in force." By the 2nd section of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), which, by s. 1, is to be read "as one Act with the County Courts Admiralty Jurisdiction Act, 1868," any county court appointed to have Admiralty jurisdiction shall have jurisdiction to try the following causes, viz. (inter alia), "(1.) as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed three hundred pounds"; and by s. 4, it is provided that the 3rd section of the Act of 1868 "shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds." It is contended that by the Act of 1868, or, if not, by the Act of 1869, independently of the Act of 1868, jurisdiction has been given to the county courts to try a cause such as the present, whether the Court of Admiralty had jurisdiction over it or not. It was held by the Court of Appeal in *The Alina* (1), that the 2nd section of the Act of 1869 gave the county courts jurisdiction in cases of claims arising out of charterparties, thus shewing that the jurisdiction conferred goes beyond the jurisdiction of the High Court of Admiralty: see also *The Hero* (2); *The County of Durham* (3); *The Justitia.* (4) *Allen* v. *Garbutt* (5) depended on the County Courts Act, 1868. The Act of 1869, s. 4, gives a county court a jurisdiction larger than that of the Court of Admiralty.

Gorell Barnes, Q.C., and *Butler Aspinall*, for the respondent. Having regard to the provisions of recent statutes in relation to Admiralty matters and the previous state of the practice of the Admiralty Court, it is clear that that Court has no juris-

(1) 5 Ex. D. 227.
(2) [1891] P. 294.
(3) [1891] P. 1.
(4) 12 P. D. 145.
(5) 6 Q. B. D. 165.

diction in such a case as this. The County Courts Admiralty Jurisdiction Acts only give to the county courts the same jurisdiction as the Admiralty Court had up to a certain amount: *Everard* v. *Kendall*. (1) The course of legislation shews that either the Admiralty Court never exercised such a general jurisdiction over torts as has been contended for, or, if it did, such jurisdiction had become obsolete, and it was considered necessary to restore it to some extent by statutory provisions. The first Act which it is necessary to allude to is 3 & 4 Vict. c. 65. That Act only contemplated certain classes of proceedings, which are all proceedings in rem—i.e., against the ship. Sect. 6 of that Act applied only to cases where the ship was under arrest. It was not until 1854 that the Act 17 & 18 Vict. c. 78, was passed, which by s. 13 gave a special power to sue owners of a ship in personam, in cases in which proceedings could be taken against the ship. That is strong to shew that at that time the Court of Admiralty did not exercise the jurisdiction contended for. Sect. 13 gives a right to proceed by monition against the owners of a ship, shewing by implication that it would have been necessary before to proceed against the ship. No right is given to proceed against any other wrongdoers than those who are responsible as owners of the property which did the damage, i.e., the ship. The only powers which the Court of Admiralty ever exercised against the master were in regard to the discipline of the ship. The statute 24 & 25 Vict. c. 10, recites that it is expedient to extend the jurisdiction of the Court of Admiralty, and ss. 4–11 give jurisdiction in certain cases in personam; but none of those provisions extend to an action in personam against a pilot. In Williams & Bruce on Admiralty Practice, 2nd ed. pp. 1–30, is given a complete summary of the history of the Court of Admiralty, and the struggles between that Court and the Common Law Courts. The principle upon which the Common Law Courts always acted in prohibiting the Admiralty Court was, that wherever there was a common law jurisdiction, or matter of which the Common Law Courts could take cognizance, prohibition to the Admiralty Court lay. *The Bilbao* (2) and *The Malvina* (3) shew

(1) Law Rep. 5 C. P. 428.

(2) Lush. 149.

(3) Lush. 493.

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what is the scope of such provisions as s. 7 of the Act 24 & 25 Vict. c. 10. If their scope was such as the appellants contend, the utmost difficulty would at once arise, because the Admiralty rule as to damage in case of collision differs from the Common Law rules in actions of tort. Sect. 7 applies only to collisions between ships, not to collisions between a ship and a barge: *Smith* v. *Brown.* (1) There is no decided case in which such an action as this against a pilot has been maintained. The Act 31 & 32 Vict. c. 71, gives a more limited jurisdiction in cases of collision than that of the Admiralty Court. Sect. 2 provides that county courts may be appointed by Order in Council to have jurisdiction for Admiralty purposes. By s. 3 such a court is to have jurisdiction to try certain causes called in the Act "Admiralty causes," and it is clear from the language of that section, and of the subsequent ss. 6–22, that it only has reference to proceedings against ships and their owners, and not to proceedings in personam such as these. By s. 8 of the Act any cause may be transferred from the county court to the Court of Admiralty, which seems to shew that it must have been contemplated that such causes would be causes in which that Court would have had original jurisdiction. The Act 32 & 33 Vict. c. 51, is to be read as one with the Act of 1868, and is subject to the same considerations.

Except the statement in Marsden's Law of Collisions at Sea, 3rd ed. p. 317, there is nothing to shew that such an action as this in personam was ever maintained in the Admiralty Court against the master of a ship. The master is not unfrequently a part owner, and in that capacity he may have been made a defendant in the Admiralty Court in many cases. *The Urania* (2) and *The Alexandria* (3) are authorities that such an action against a pilot will not lie: see also *Flower* v. *Bradley.* (4) At the most, the authorities relied on by the appellants are mere dicta; the cases cited do not in themselves shew that an action in personam will lie against a pilot. *The Clara* (5), *The Victor* (6), *The*

(1) Law Rep. 6 Q. B. 729.
(2) 5 L. T. (N.S.) 402; 10 W. R. 97.
(3) Law Rep. 3 A. & E. 574.
(4) 44 L. J. (Ex.) 1.
(5) Swab. (Ad.) 3.
(6) Lush. 72.

Volant (1), and *The Sarah* (2) were all suits against the owners of the ship in rem. *The Trelawney* (3), *The Hope* (4), and *The Rapid* (5) were salvage cases, and they really shew that the jurisdiction in such cases is in rem, but that, where one party has induced the other party to give up his lien, he cannot afterwards be heard to say that there is no jurisdiction in personam by monition. *The Swallow* (6) was a case of damage done by a Queen's ship; and in such cases the Admiralty agrees to be bound by the decision of the Admiralty Court: see also *Ramsey* v. *Allegre.* (7)

In the "Addition to the Inquisition of Queenborow," Black Book of the Admiralty, vol. i., p. 161, it is only said: "Lett inquiry be made of lodesmen (or pilots) whoe doe take upon them piloting which they know not how to perform, whereby a ship is sunk or a man is killed"; and so again, at p. 230. And it is stated in the Introduction by Sir Travers Twiss (p. xxxvi.) that Selden, in his notes upon Fortescue, says of the Black Book: "But the Book itself is rather a monument of antiquitie (yet not above about Henry VI.) than of autority, and rather as a purpose of what was in some failing project, than ever in use and judgment held authenticall." And in the Laws of Oleron, Black Book, vol. i. p. 129, it is said: "It is established for a custom of the sea that yf a shyp is lost by default of the lodeman the maryners may, if they please, bring the lodeman to the windlass or any other place, and cut off his head withoute the maryners being bound to answer before any judge, because the lodeman has committed high treasone against his undertakynge of the pilotage."

As to the cases cited from Burrell's Admiralty Cases by Marsden—in *Pillans* v. *Sherburne,* p. 319, a collision case (decided in 1754), it does not appear whether the master was a part owner of the ship, as he might have been, nor whether the question of jurisdiction was raised. *De Kromment* v. *Chevalier,* p. 321 (in 1758), was a collision case against the master of a ship, and there

(1) 1 Wm. Rob. 383.
(2) Lush. 549.
(3) 3 Ch. Rob. 216, n.
(4) 3 Ch. Rob. 215.
(5) 3 Hagg. (Adm.) 419.
(6) Swab. (Ad.) 30.
(7) 12 Wheat. 611.

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the suit was dismissed for want of proof of damage. In *Strong* v. *Teesdale*, p. 269 (in 1694), the suit was dismissed. In *Cowton* v. *Cocke*, p. 298 (in 1712), a similar case, the suit was dismissed. In *Pigg* v. *Goldsburg*, p. 299 (in 1711), the suit was against the master of a ship, " et socios pro interesse suis intervenientes." "Socios" must mean "co-owners." *Russell* v. *Hays*, p. 307 (in 1724), is the only instance to be found of an action against a pilot in the Court of Admiralty. But there the action was by the master of the same ship, and the cause of action is not stated. The action failed for want of proof. In *Taylor* v. *Thompson*, p. 302 (in 1714), the action was by the owner of one ship against the master of another, the cause of action not being stated. In *Ewer* v. *Thirkettel*, p. 310 (in 1729), the action was by the owners of cargo against the executrix of the master of the carrying ship, and it was dismissed. *Wernam* v. *Churchwood*, p. 260 (in 1682), was an action by the owners of a ship against the master and mate in personam. The cause of action does not appear. On the same page it is stated that prohibitions were sent from the King's Bench to the Court of Admiralty in several cases, the names of which are given. All these cases were decided at a time when very little attention was paid to the Court of Admiralty, and it had in fact almost fallen into desuetude. No cases of similar actions are to be found in later times. *The Jack Park* (1) was an action against the master of a ship for wages by a mariner who had been pressed into the King's service, and it was dismissed for defect of proof. In *The Agincourt* (2) the action was by a mariner against the master for ill-treatment, and justification was pleaded. Lord Stowell, in awarding damages to the plaintiff, said, at p. 289: "I trust I am not so insensible of the duties of my own office, and of the necessity of supporting the maritime discipline of the country, as to be willing to sacrifice them both in any instance to the desire of obtaining a noxious popularity." *The Lowther Castle* (3) was a similar action against a master; justification was pleaded, and the action was dismissed on the ground that the justification was established. In *The Enchantress* (4) the action was by a seaman against the

(1) 4 Ch. Rob. 308.
(2) 1 Hagg. (Adm.) 271.
(3) 1 Hagg. (Adm.) 384.
(4) 1 Hagg. (Adm.) 395.

master for violent assault and cruelty. No objection was raised to the jurisdiction. In *The Ruckers* (1) the action was by a passenger against the master of the ship for damages for an assault on the high seas. It is stated (p. 75) that the master desired to obtain a speedy decision, and was by no means desirous to avoid a hearing in the Court of Admiralty. The objection to the jurisdiction was taken very feebly. The registrar reported that there were precedents of similar actions; and, on the ground of the precedents, Sir W. Scott held that there was jurisdiction. The American case, *Ramsey* v. *Allegre* (2) shews that the jurisdiction of the Admiralty Court in personam, wherever it remains, is a remnant of its old criminal jurisdiction.

[LORD ESHER, M.R. In Pritchard's Admiralty Digest, 2nd ed. vol. i. p. 204, n. 11, under the title "Damage, Personal," it is said: "A suit may be instituted in the Admiralty, not only by a sailor, or other officer employed on board a ship during a voyage, against the captain or master, or other person on board the same ship, or against a person on board another ship, for an assault and battery, but even by a passenger against the master, when the injury was committed during a voyage, or on the high seas."]

The Sylph (3) was an action in the Admiralty Court under the Act 24 & 25 Vict. c. 10, s. 7, against a ship for personal injuries to the plaintiff; and the question was, whether there was jurisdiction under that section. The case is valuable by reason of the observations of Sir R. Phillimore upon *The Agincourt* (4), *The Lowther Castle* (5), and other cases. *The Evangeline* (6) was an action for freight under a charterparty, and it was dismissed on the ground of want of jurisdiction because the defendant had not appeared. *The Malvina* (7) only decided that the owners of a ship can, under s. 7 of 24 & 25 Vict. c. 10, be made liable in the High Court of Admiralty for damages by a collision with a barge within the body of a county. *The Diana* (8), was a case under the same section of damage by collision in foreign inland waters

(1) 4 Ch. Rob. 73.
(2) 12 Wheat. 611.
(3) Law Rep. 2 A. & E. 24.
(4) 1 Hagg. (Adm.) 271.
(5) 1 Hagg. (Adm.) 384.
(6) 2 L. T. (N.S.) 137.
(7) Lush. 493.
(8) Lush. 539.

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between two British ships. *The Mac* (1) is not in point. The only question there was, whether a barge was a "ship in distress" within the meaning of s. 458 of the Merchant Shipping Act, 1854. *Everard* v. *Kendall* (2) is a distinct authority that by virtue of the County Courts Acts a county court has no greater jurisdiction than the Court of Admiralty had on the high seas. The only exception is in the case of a charterparty, as is shewn by *The Alina.* (3) There is a marked difference between the language of s. 7 of the Act 24 & 25 Vict. c. 10, which applies to the High Court, and gives jurisdiction "over any claim for damage done by any ship," and that of the County Courts Acts.

The words of s. 3 of the Act of 1868 are "damage by collision," and those of s. 4 of the Act of 1869, "all claims for damage to ships, whether by collision or otherwise." In the present case the barge was propelled by oars, and the Admiralty Court would not have had jurisdiction, and the pilot, being a licensed one, could not be made liable beyond the amount of his bond.

The Zeta (4) was an action by shipowners against proprietors of docks for damage to a ship by collision with the dock wall, caused by the negligence of the defendants' servants. *The Dowse* (5) shews that the county court has no greater jurisdiction in such a case as the present than the Admiralty Court would have had. *Allen* v. *Garbutt* (6) is a decision to the same effect. *Robson* v. *Owner of The Kate* (7) shews that the County Courts Acts are to be strictly construed. It was held there that damage by a ship to a pile-driving machine on the bank of a river was not damage by collision within sub-s. 3 of s. 3 of the Act of 1868.

In the passage cited from Blackstone's Commentaries, original edition, vol. 3, p. 106, the only instance given of the jurisdiction of the Admiralty Court in cases of contract is "seaman's wages." The statements made in Browne's Law of Admiralty, 2nd ed. vol. 2, p. 107, go too far, as appears by what is said on p. 110. *Caton* v. *Burton* (8) was a suit for an assault on the high seas

(1) 7 P. D. 38, 126.
(2) Law Rep. 5 C. P. 428.
(3) 5 Ex. D. 227.
(4) [1891] P. 216.
(5) Law Rep. 3 A. & E. 135.
(6) 6 Q. B. D. 165.
(7) 21 Q. B. D. 13.
(8) 1 Cowp. 330.

It does not appear against whom the action was brought, and no objection to the jurisdiction was raised by the pleading.

[LORD ESHER, M.R. In the Court of Admiralty a defendant could appear under protest.]

In *The Athol* (1), the point was, whether a public officer of the Crown was bound to appear at the suit of a subject. *The Henrich Björn* (2) and *The County of Durham* (3) do not really assist the appellants. Sect. 21 of the County Courts Act of 1868 does not apply, unless the proceeding is against a ship or her owners: *The Hero* (4). That case turned on s. 74 of the County Courts Act, 1888 (51 & 52 Vict. c. 43).

No rules and orders having been made for the purpose, there is no provision for suing a pilot.

The view of Story, J., in *De Lovio* v. *Boit* (5), as to the extent of the jurisdiction of the Admiralty Court, has never been accepted by the English Courts.

To sum up the argument for the defendant:—

(1.) The Admiralty Court had no jurisdiction in personam in respect of damages caused by a collision on the high seas. No authority has been cited for such an action against the master or the pilot, or even against the owner of a ship.

(2.) Sect. 10 of the Act 24 & 25 Vict. c. 7, did not give such a jurisdiction to the Admiralty Court.

(3.) The County Courts Acts of 1868 and 1869 do not confer such a jurisdiction on the county courts.

Pyke, in reply. There is no warrant in principle or authority for the proposition that before the statutes relating to the Court of Admiralty the Court had no jurisdiction in personam in respect of collision on the high seas. The Act 13 Rich. 2, c. 5, gave such a jurisdiction. Proceedings in the Admiralty Court were originally in personam, and the proceeding in rem was introduced in order to enforce the appearance of the defendant. This jurisdiction in personam has never been taken away by statute, and there is no legal force in the argument that the jurisdiction has become obsolete. That the jurisdiction existed is shewn by *The*

(1) 1 Wm. Rob. 374.
(2) 11 App. Cas. 270.
(3) [1891] P. 1.
(4) [1891] P. 294.
(5) 2 Gallison, 398.

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Evangeline. (1) The statement of the jurisdiction of the Admiralty Court contained in Godolphin's Admiral Jurisdiction, ed. 1661, p. 43, shews that there must have been a process in personam, and this statement is cited with approval in The Sea Laws, 2nd ed. c. 1708, at p. 208. *The Clara* (2) shews that in the Admiralty Court there was a proceeding by arrest either of the person or the ship, and this is confirmed by Pritchard's Admiralty Digest, 1st ed. p. 301. An action against a ship's master for wages never could have been in rem. In salvage suits, such as *The Trelawney* (3), a monition to shew cause was issued against the owner of the ship, though there had been no proceeding in rem. So, too, in *The Meg Merrilies.* (4) There was no res in that case, for the ship was on her voyage. *The Governor Raffles* (5) is to the same effect. If the argument for the respondent is well founded, there would be no jurisdiction in the Court of Admiralty in a case of collision if the defendant's ship had sunk. There could be no jurisdiction in rem in such a case, and it is said that consequently there could be no jurisdiction in personam. This cannot be so. In *The Swallow* (6) the ship which was in fault was a Queen's ship, and, therefore, there was no res. An objection to the jurisdiction can be taken after absolute appearance in the Court of Admiralty: *The Ida.* (7) Another instance of a suit in personam is *The Thames.* (8) In *Five Steel Barges* (9) it was held that an action in personam could be maintained for salvage. It may be contended that an action in personam has been brought only in cases in which the plaintiff has allowed the property to go into the defendant's possession. The answer to that is, that these are the very cases in which it might be expected that such an action would be brought. Actions for assault against a master are clearly actions in personam. In principle the present action is undistinguishable; in both cases the action is for damages. Other cases of such actions against masters are *The Coldstream* (in 1832) (10);

(1) 2 L. T. (N.S.) 137.
(2) Swab. (Ad.) at p. 3.
(3) 3 Ch. Rob. 216, n.
(4) 3 Hagg. (Adm.) 346.
(5) 2 Dod. 14.
(6) Swab. (Ad.) 30.
(7) Lush. 6.
(8) 5 Ch. Rob. 345.
(9) 15 P. D. 142.
(10) 1 Stuart's Cases in Vice-Admiralty for Lower Canada, 386.

The Friends (in 1837) (1). In the latter case the action was by a passenger. Sect. 3 of 3 & 4 Vict. c. 65, is confined to cases in the Court of Admiralty in which there was process of arrest. But in s. 4 the words "under arrest" are omitted. This shews that there was jurisdiction in personam as well as in rem. Sect. 5 deals with the distribution of salvage money, and shews that there was a process by monition. The words of s. 6 are quite general, and ought to receive the widest interpretation. Sect. 11 provides for a trial by a jury in any contested suit. Sect. 18 empowers the judge of the Admiralty Court to make rules of practice. When the Act 17 & 18 Vict. c. 78, was passed, no rules had been made under that power. Sect. 13 of that Act gives an express power to proceed by monition instead of by arrest "in cases in which a party has a cause of action against any ship." This implies that the jurisdiction of the Admiralty Court had not been only in rem. In s. 7 of the Act 24 & 25 Vict. c. 10, the words "damage done by any ship" clearly include damage done by any collision. It has been argued that under s. 3 of the County Courts Act, 1868, and s. 4 of the County Courts Act, 1869, damage done by a ship to a barge is not a "collision," but that the collision must be between two ships. This view is contrary to *Purkis* v. *Flower* (2); *The Malvina* (3), and *The Bilbao.* (4)

As to the supposed difficulty of ascertaining the amount of the defendant's liability in a case in which both vessels are to blame, the Rules of the Court of Admiralty are now, by s. 25 (9), of the Judicature Act, 1873, to prevail in the High Court. The old rule of the Admiralty Court would be followed by the county court. But at any rate this does not affect the question of jurisdiction.

Cur. adv. vult.

Dec. 18. LORD ESHER, M.R. An application was made to the Divisional Court for a mandamus to the Judge of the City of London Court to hear and determine an action of *Green* v. *Payne*,

(1) 1 Stuart's Cases in Vice-Admiralty for Lower Canada, 118.
(2) Law Rep. 9 Q. B. 114.
(3) Lush. 493.
(4) Lush. 149.

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and the Divisional Court discharged the rule nisi for a mandamus. They did so without hearing any argument, because they considered themselves bound by a previous decision in that Court. An appeal has been brought to us, and it is alleged on the one side and denied on the other that the City of London Court, which is a county court, has Admiralty jurisdiction to hear and determine the action in question. The action is brought, on the Admiralty side of the City of London Court, by the owners of a barge, against a licensed pilot, who was the compulsory pilot in charge of a ship. The action is brought in respect of a collision which took place between the ship and the barge, and which, it is alleged, was caused by the pilot's negligence, and for the purpose of this appeal we must assume that the collision was caused solely by the negligence of the pilot. The question is, whether the City Court on its Admiralty side has jurisdiction to try the action. That it would have had jurisdiction if the action had been brought on the Common Law side of the Court cannot be denied; the question is, whether it has jurisdiction to try the case on the Admiralty side. On the Common Law side, the jurisdiction of the county court is limited to cases in which the amount of the damages claimed is not greater than 50*l.*, whereas, on the Admiralty side, the jurisdiction of the Court extends to 300*l.* The difference, therefore, is in that respect extremely great, and one can easily see why the plaintiffs should be anxious to have the case tried on the Admiralty side rather than on the Common Law side. The appeal was argued with great ability, and certainly at considerable length. The appellants' counsel, as was, no doubt, their privilege (I do not say it was not their duty to do so), led us into a very extensive inquiry, and into the consideration of numerous cases, which they treated with great skill. The respondent's counsel were afraid, I dare say rightly, to take their stand upon a more limited view of the case. But, after all, the question which we have to decide is a narrow one, viz., whether the county court has this Admiralty jurisdiction with regard to a pilot; and we need not determine on the present occasion whether it has jurisdiction against other persons, for instance, against the master of a ship. The argument for the jurisdiction

of the Court took this line. It was said: "This is an action for tort against a pilot, and if the tort had occurred on the high seas the Admiralty Court would have had jurisdiction, because it has jurisdiction in all cases of tort committed on the high seas, and that jurisdiction up to the amount of 300*l.* has been conferred by the County Courts Acts on the county court as regards torts committed within its district." That was the first point. The second point was, that, even if the Admiralty Court would not have had jurisdiction, nevertheless the County Courts Acts have given to the county courts a jurisdiction which the Admiralty Court has not. On the other side it was said, that the Admiralty Court never had, and has not now, jurisdiction in such a case, and that the County Courts Acts, except in one particular matter, have given to the county courts only that jurisdiction which the Admiralty Court had; they have only given a part of that jurisdiction, viz., up to a certain amount, which the Admiralty Court has; and if the Admiralty Court has not the jurisdiction, it follows that the county court has not.

I will take the second point first, because it is a short one, and, to my mind, it is conclusively established that, except in one particular, a county court has no jurisdiction except to a limited amount in regard to matters in which the Court of Admiralty has jurisdiction, and that (with that one exception) if the Admiralty Court has no jurisdiction, the County Courts Acts have not given any jurisdiction to the county courts. I think this was decided (except as regards the one particular to which I have referred) in *Everard* v. *Kendall*. (1) There the judge of the City Court had in his Admiralty jurisdiction assumed to exercise jurisdiction in a case of collision on the river Thames between two barges propelled by oars only. Now the Admiralty Court has never assumed or exercised (at all events, for many years) jurisdiction, and it denies that it has jurisdiction, in respect of a collision between barges propelled by oars only. Such a collision cannot in any sense of the word be held to be a "collision between ships"; and in *Everard* v. *Kendall* (1) it was held, on a motion for a writ of prohibition to the judge of the City Court, that the Admiralty jurisdiction of

(1) Law Rep. 5 C. P. 428.

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a county court in cases of collision was not more extensive than that of the High Court of Admiralty, and that, as the Court of Admiralty had no jurisdiction over such a collision, the county court had no such Admiralty jurisdiction, and that the prohibition should issue. That was so held by Keating and Montague Smith, JJ., and myself. Keating, J., said, at p. 430, "I cannot satisfy myself that it was the intention of the legislature to give the county courts a jurisdiction over Admiralty causes other than those over which the Admiralty Court has jurisdiction." He afterwards gives his reasons for that conclusion, amongst them the extreme improbability of the legislature having intended to give to a county court jurisdiction in a case of collision, which might under s. 7 be removed into the Admiralty Court, and which, if it were so removed, the Admiralty Court could not try. That decision has never been overruled (unless it was by a case which I shall presently consider), and the reasoning of it is to my mind perfectly satisfactory. That was the view of a Court of Common Law. But in *The Dowse* (1) (in 1870), there was an appeal to the Court of Admiralty against the decision of the assessor of the Court of Passage at Liverpool. The statement in the head-note is: "In an Admiralty cause, instituted in the Court of Passage to recover a claim for necessaries supplied to a vessel in the port of Liverpool, the defendants in their answer alleged that at the time the necessaries were supplied the vessel belonged to the port of Liverpool, and that at the time of the institution of the suit a part owner of the vessel was domiciled in England." The assessor, on objection by the plaintiffs to these allegations as irrelevant, ordered them to be struck out. "On appeal to the Court of Admiralty the decision of the assessor was reversed, on the ground that the County Courts Admiralty Jurisdiction Act, 1868, does not confer upon the Court of Passage a more extensive jurisdiction as to any claim for necessaries than that exercised by the Court of Admiralty." Sir Robert Phillimore said, at p. 140: "It has been contended that there is no limitation which narrows the construction of the words 'any claim,' and though it is admitted that the High Court of Admiralty would have no original juris-

(1) Law Rep. 3 A. & E. 135.

diction in this matter, that it would have an appellate jurisdiction, and also that it might, under the authority of the 6th section, order the cause to be at once transferred to this Court, and so, in fact, exercise original jurisdiction. There is no doubt that the High Court of Admiralty has exercised and may exercise an appellate jurisdiction in a matter over which it has no original jurisdiction. The High Court of Admiralty was formerly the Court of Appeal in Revenue cases decided in the Colonial Admiralty Courts; and under the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), it has an appellate jurisdiction as to claims arising out of agreements for the use or hire of a ship and the carriage of goods in a ship, as to which there was no original jurisdiction. But I think I must construe the County Courts Admiralty Jurisdiction Act, 1868, independently of these considerations." And then he held that, because the Admiralty Court had no jurisdiction in such a case, therefore the Court of Passage, which is a Court different from, and I will say superior to, a county court, had no jurisdiction. It follows, to my mind, that he agreed with the decision in *Everard* v. *Kendall* (1); he agreed that inferior courts, such as county courts, can have no such jurisdiction under these Acts; that Parliament did not intend that they should have any jurisdiction in cases in which the Admiralty Court had no jurisdiction. I come, therefore, to the conclusion that, except in one particular case which I am about to mention, a county court has no jurisdiction by reason of the County Courts Acts when the Admiralty Court would not have jurisdiction, but that all that these Acts do is to transfer a limited portion of the jurisdiction of the Admiralty Court to the county courts.

But then there is the case of *The Alina* (2), which was decided by Kelly, C.B., and Stephen, J., in the Divisional Court, and their judgment was overruled in the Court of Appeal by Jessel, M.R., and James and Cotton, L.JJ. In that case the action was for breach of a charterparty, and the Court of Appeal held that, with regard to a charterparty, the words of s. 2 of the Act of 1869 clearly gave the county courts jurisdiction, although

(1) Law Rep. 5 C. P. 428. (2) 5 Ex. D. 227.

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the Admiralty Court had none. I desire to speak with great respect of *The Alina* (1); but I think that rules of interpretation are laid down in that case which are absolutely novel. I will obey that case, because it is the decision of the Court of Appeal until it has been reviewed by the House of Lords, and then I will obey whatever the House of Lords determines; but I will not be bound by *The Alina* (1) one particle beyond what it actually decides and determines. I do not consider that it has overruled all former cases and all rules for the interpretation of statutes. Now, it seems to me that it was decided by the Court of Appeal upon, first of all, this new rule of interpretation. Jessel, M.R., says that the words of s. 2 are quite clear, and that, if the words of an Act of Parliament are clear, you must take them in their ordinary and natural meaning, unless that meaning produces a manifest absurdity. Now, I say that no such rule of construction was ever laid down before. If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this—if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation. If the learned judge meant to say that, when the meaning of general words is (if you look at them by themselves) clear, that determines their construction at once, even though from the context —from other parts of the same Act—you can see that they were intended to have a different meaning; if he meant to say that you cannot look at the context—at another part of the Act—to see what is the real meaning, then again I say he has laid down a new rule of interpretation, which, unless we are obliged to follow it in the particular case, I would not follow. Then again he says, with reference to the words of s. 2 of the Act of 1868, "Claims arising out of any agreement made in relation to the use or hire of any ship," that you cannot find words which more perfectly describe a charterparty. It may have seemed

(1) 5 Ex. D. 227.

so to him. To my mind, there are ninety-nine out of a hundred charterparties which do not give the hire of the ship at all. But it is said they give the use of a part of the ship. They do nothing of the kind. There are charterparties, rare and few, which do amount to a hire of the ship. Those are exceptional charterparties. A charterparty is an agreement between the shipowner and the shipper with regard to the carriage of goods. Of what part of the ship does it give the use to the shipper, unless it gives him the hire of the whole ship? Unless it is a demise of the ship, it gives him the use of no particular part which he can fix upon. The shipowner has a right to put the cargo into any part of the ship he chooses. He has a right, if he can do it without damage to the cargo, to alter the place of the stowage even during the voyage. He may transfer the goods from one part of the ship to another. There is not one single inch of the ship to which the charterer has an exclusive right. His only right is to have his goods carried. And I must say that I think the late Master of the Rolls gave about as oblique a construction to the judgments in the cases on which he commented as I ever saw. He seems to have thought that in those cases the judges held that, though the words of an Act are clear, nevertheless, if they lead to inconvenience, they should construe them in another way. I venture to say that no judge ever asserted, or held, or thought of anything of the kind. I will, therefore, follow *The Alina* (1) so far as it actually goes, but not one inch further. It decides that the county courts have, with regard to the interpretation and the application of charterparties, a jurisdiction which the Admiralty Court has not. That results in this peculiar state of things, that the legislature have given, to the extent of 300*l.*, power to the county court judges in their Admiralty jurisdiction to construe and to apply one of the most difficult of contracts known to the law, that of a charterparty; whereas in the case of an ordinary contract of the easiest description to construe and apply the legislature have given them jurisdiction only to the extent of 50*l.* With regard to a charterparty, I take it that *The Alina* (1) is binding upon this Court, and I shall, of course, fully obey it; but it applies

(1) 5 Ex. D. 227.

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only to the case of a charterparty, and not to such a case as that which is now before us. I come, therefore, to the conclusion that in the present case no jurisdiction has been given to the county courts which is not possessed in a similar case by the Admiralty Court.

That obliges me to consider the most able, industrious, and elaborate argument of the appellants' counsel that the Admiralty Court has such a jurisdiction. They said that from the earliest times the Admiralty Court had jurisdiction in every tort committed on the high seas; and that, if it had that jurisdiction at any time, the mere assertion or proof that it has become obsolete (that is, unused) cannot take away a jurisdiction which once existed. I shall not trouble myself with the second proposition, but I will examine into the first. We were led back to the earliest times, to Sir Leoline Jenkins, and to all the great doctors who asserted the highest and fullest jurisdiction of the Admiralty upon the high seas. It must be recollected, however, that those who (it is said) asserted this jurisdiction with regard to torts, asserted it also in the fullest degree with regard to every kind of contract, and to everything which could happen on the high seas. I know that that was the assertion of the Admiralty, of many of its judges, and all its practitioners. But there was not a single case of those which the appellants' counsel cited (except those collected by Mr. Marsden), which, when I turned to my books, I did not find had been so marked by me as to shew that I had carefully considered it on some previous occasion. It is said that there is a decision of Dr. Lushington in favour of the jurisdiction, and (merely to shew the danger of taking words from a judgment without looking further) I will at once grapple with it. In *The Sarah* (1), Dr. Lushington said, at p. 550: "The Court has original jurisdiction, because the matter complained of is a tort committed on the high seas." There, it is said, is a declaration by Dr. Lushington that he had jurisdiction over all torts committed on the high seas. That case was decided in November, 1862; but if we turn to the earlier case of *The Ida* (2), in which the subject-matter was the wilful cutting of a barque adrift, whereby she capsized a barge which con-

(1) Lush. 549. (2) Lush. 6.

tained cargo, Dr. Lushington says, at page 9: "The Court, however, is still further indisposed to exercise jurisdiction on account of the peculiar nature of the act for which the plaintiffs are now trying to render the defendant's ship liable. The Court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only." Therefore, by what he said in *The Sarah* (1), he did not really mean every tort committed on the high seas, but only wrongful collisions; and he limited himself in *The Ida* (2) by saying in effect that the jurisdiction of the Admiralty had never extended to all torts committed on the high seas.

But then there comes the great and learned judgment of Mr. Justice Story in the American case of *De Lovio* v. *Boit* (3), which is always referred to whenever this large jurisdiction of the Admiralty is asserted. Mr. Justice Story, whom I may venture to call an exceedingly great judge, in one of the most learned judgments which could be pronounced, went through every case which could be found anywhere from the earliest time, and he asserted for the Admiralty Court the largest jurisdiction which that Court had ever claimed. He held that in America, at all events, that Court had jurisdiction, not only over every tort committed on the high seas, but over every contract which is to be wholly or partly performed on the high seas. In that particular case he held that the Court of Admiralty had jurisdiction over a policy of insurance, and that a policy of insurance in respect of ships or goods could be enforced by it. It is undoubted that no such jurisdiction has ever been even attempted in England. Now, I do not think that the judgment of Mr. Justice Story has been adopted to anything like its fullest extent even in America. I am inclined to think that American judges have since flinched from it, and that the American Courts do not attempt to exercise such a jurisdiction. But that judgment has been treated in one way only in this country. It has always been said that it is a departure by the American Courts with regard to the jurisdiction of the Admiralty from what has been held in England. In England, no doubt, the Admiralty Court did assert jurisdiction up to the fullest

(1) Lush. 549. (2) Lush. 6. (3) 2 Gallison, 398.

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extent of that judgment; but it was met by the most determined resistance on the part of the Common Law Courts. Prohibitions were issued over and over again, in case after case, and on point after point, and at last the Admiralty Court in England gave way to the opposition of the Common Law Courts, and ceased to exercise jurisdiction to the full extent of its claim—not because the jurisdiction had become obsolete, but because the judges of the Admiralty Court yielded, and were obliged to yield, to the prohibitions which were granted, and which they knew would inevitably be granted if they were to go on. They did not give up any jurisdiction or allow it to become obsolete; they could not maintain that they had it, nor could they exercise it, for, though they had claimed it before, they had been stopped by prohibition from exercising it. It is useless, therefore, to cite an American decision with regard to the jurisdiction of the Admiralty Court; it is not binding on us, and it has been disregarded in this country.

I come, then, to inquire what the English law is. On what does the jurisdiction of the Admiralty Court depend? It does not depend merely on the fact that something has taken place on the high seas. That it happened there is, no doubt, irrespectively of statute, a necessary condition for the jurisdiction of the Admiralty Court; but there is the further question, what is the subject-matter of that which has happened on the high seas? It is not everything which takes place on the high seas which is within the jurisdiction of the Admiralty Court. A third consideration is, with regard to whom is the jurisdiction asserted? You have to consider three things—the locality, the subject-matter of complaint, and the person with regard to whom the complaint is made. You must consider all these things in determining whether the Admiralty Court has jurisdiction. Now, that owners of ships are persons with regard to whose conduct and liability the Court of Admiralty has and exercises jurisdiction cannot be doubted. Mr. Barnes argued that the Admiralty jurisdiction in personam can be exercised only in cases in which it could be exercised under certain circumstances in rem—that is, by seizing the property of the persons in question. As at present advised, I am not prepared to assent to that argument.

But while the argument on one side goes too far one way, the argument on the other side goes too far the other way. The question we have to consider in this case is that of the persons subject to the jurisdiction. As to the subject-matter of the complaint, we know that the Admiralty Court has jurisdiction in respect of damage by collision, and it has that jurisdiction over the owners of the ships which are alleged to have been in collision. If, therefore, there is a collision on the high seas, you have the right place and the right subject-matter; and if the proceeding is against the owners, you have the right persons. In such a case there can be no doubt about the jurisdiction of the Admiralty Court. But, if any one of the three matters is wanting, the Admiralty Court may not have jurisdiction. If there is a collision between two ships on the high seas, that the Admiralty Court has jurisdiction to deal with the liability of the owners of those ships is true, and it can exercise that jurisdiction either by action in rem or by action in personam. Given the jurisdiction, the question whether the action is to be in rem or in personam is one of mere procedure. Suppose, however, that the complaint is in respect of a collision between two ships on the high seas, but it is sought to make liable, not the owner, but the master or some members of the crew. Many cases were cited in which the Court of Admiralty had dealt with the master of a ship by its procedure in personam. It is obvious that it could not proceed against the master by an action in rem unless he was also a part owner of the ship. I think it cannot be denied that the Admiralty Court has exercised jurisdiction over the master with regard to certain complaints; but, whether the Admiralty Court can exercise, or ever has exercised, jurisdiction over the master in respect of a collision, so as to make him liable to the full extent of the damage, I will not decide on the present occasion, though the strong inclination of my opinion is, that the Court of Admiralty has never exercised such a jurisdiction against the master. There is no decided case on the point one way or the other; and the question, therefore, remains for decision hereafter. But there are matters which, whenever the point arises for decision, will have to be very carefully considered—viz., whether the master can be made liable to the full extent of

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the damage done to the complaining ship, although the ship which he is commanding is of small value, and the liability of the owners would by statute be limited to the value of their ship, and what is to be the effect in favour of the master of contributory negligence on board the complaining ship. The Admiralty rule seems inapplicable. But we are not dealing now with the case of the master, and I will not determine it The present case is that of a pilot; and I think it has been two or three times decided that the Court of Admiralty has no jurisdiction over a pilot in respect of a collision caused by his negligence. Whether he be a compulsory pilot or not must be wholly immaterial. If the neglect by which the collision is caused is his act, he is liable at Common Law, whether he be a compulsory pilot or not. But can the Court of Admiralty entertain an action against a pilot for damages in respect of a collision caused wholly or partly by his negligence? That a Common Law Court can do so, there can be no doubt. But can the Court of Admiralty? There is *The Urania*. (1) In that case Dr. Tristram moved that a citation should issue in personam against a pilot in respect of a collision caused by his negligence. He seems to have put his claim to a citation upon two grounds. First, that the Court could enforce the bond into which the pilot (he being a Trinity pilot) had entered. Dr. Lushington said that the Court of Admiralty had no jurisdiction to enforce such a bond, and that he could not grant a citation upon that ground. I think that Dr. Tristram asked for the citation on another ground—viz., that s. 7 of the Admiralty Court Act, 1861, had given the Admiralty Court jurisdiction to cite the pilot in respect of his neglect, which had led to the collision. But Dr. Lushington said: "I am of opinion that s. 7 of the Admiralty Court Act, 1861, does not apply to the present case." There is a direct ruling by Dr. Lushington; and, I venture to say, he knew the practice of the Admiralty Court—knew its rights and their limitations—better than any man now alive; and he deliberately came to the conclusion that such an action against a pilot was not within the cognizance of the Admiralty Court. That was the ruling of Dr. Lushington with regard to this matter in 1861. That case has

(1) 10 W. R. 97.

been since followed in *The Alexandria.* (1) The head-note is: "A ship by compulsion of law in charge of a duly licenced pilot in the River Mersey came into collision with and occasioned damage to another vessel. The owners of the damaged vessel instituted an Admiralty suit in the Court of Passage against the pilot:—Held, on appeal, affirming the decision of the assessor of the Court of Passage, that the Court of Passage had not jurisdiction to entertain the suit as an Admiralty suit"; and then the head-note goes on: "Semble, the Court of Admiralty has not jurisdiction to entertain such a suit." This was a decision of Sir Robert Phillimore. He said, at p. 582: "The question raised is whether that Court" (that is, the Court of Passage), "exercising Admiralty jurisdiction, had power to entertain a suit brought by the owner of a ship which had been injured by collision on the high seas against the pilot in charge of the wrongdoing vessel at the time of the collision. The Court below held that it had not power to entertain such a suit. . . . I think it right to state that if the question were res integra I should be of opinion that, under the provisions contained in ss. 7 and 35 of 24 Vict. c. 10, the Court had jurisdiction in this suit; but it appears to me that this very question was distinctly raised before my predecessor, who, in *The Urania* (2), apparently, without doubt, decided the contrary. . . . In these circumstances, in the absence of any precedent, and remembering that the plaintiff has a remedy at Common Law, it would, I think, be wrong in me to reverse this judgment." There the point was decided again. It has been decided, I believe, since.

Then there is the case of *Flower* v. *Bradley* (3), in which a mandamus to the judge of a county court was asked for. The head-note is: "An action against a pilot for collision damage caused to a barge by a vessel under his charge is not an 'Admiralty cause' within the meaning of the Acts 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, which confer Admiralty jurisdiction upon certain county courts." That case was decided upon the authority, amongst others, of *Everard* v. *Kendall* (4), and *The Urania.* (2) Therefore, Sir R. Phillimore, in the Admiralty

(1) Law Rep. 3 A. & E. 575.
(2) 10 W. R. 97.
(3) 44 L. J. (N.S.) (Ex.) 1.
(4) Law Rep. 5 C. P. 428.

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Court, did not venture to contradict the decision in *The Urania* (1), and it was acted upon by the Court of Exchequer; and from the beginning to the end there is not a single case to be found in the books which shews that the Admiralty Court ever entertained such a claim as this against a pilot.

Now I come to those cases which have been so carefully produced by Mr. Marsden in his edition of Burrell's Admiralty Cases. I have sent for the books from which he has taken his extracts. He has taken them with perfect correctness; but when I look at those books it seems to me that they cannot be relied upon as shewing any decisions. They contain notes which are equivalent to the notes which are taken by the clerk of assize or the Master in Court of the steps in a cause, with the dates at which those steps are to be resumed, and such like matters. They are not entries of decisions upon which the Court can rely. Therefore, even if there is to be found in that book a case which looks like the entertaining of an action against a pilot (I do not think there is), I say it cannot be relied upon as a decision. Therefore, it comes to this, that from the beginning of time until now not one case is to be found in the Admiralty Court of any such action being entertained against a pilot, and yet the books are teeming with cases in which collisions have been the result of the negligence of pilots. To suppose that there have not been hundreds and hundreds of instances in which such an action against a pilot might have been entertained is absurd; and when none is to be found in the books, is not that strong to shew that the judges of the Court of Admiralty have—not allowed a jurisdiction to become obsolete—but have given up their original claim to exercise jurisdiction over every tort committed on the high seas, and, amongst others, to enforce such a claim against a pilot? There are strong reasons for their so doing which are as applicable to a master as to a pilot; but I confine myself for the present to a pilot. If a pilot is sued at Common Law, in respect of a collision which has occurred through his want of ordinary skill or through his negligence, if the person who is either by himself or by his servants claiming against him has been guilty of what is called contributory negligence, that

(1) 10 W. R. 97.

is, of negligence without which the collision would not have happened, although the pilot had been negligent that at Common Law would be a perfect defence; the pilot would not be liable at all. In the Court of Admiralty, under the very same circumstances, the pilot would have to pay half the damage, and there would be no set-off; whereas, if both ships are damaged, there is a set-off as between them—that is, the damages are added together, and are divided according to the rule of the Admiralty. Therefore, the pilot's position is altered if he is sued in the Admiralty Court, and there is, therefore, very good reason why he should not be sued in that Court. Moreover, there was a long period of time—it is different now—in which the pilot's liability would have had no limit in the Admiralty Court, although the owners of the ship would have had only a limited liability. There are very good reasons, therefore, why the Court of Admiralty should never have exercised such a jurisdiction. It never has done so, and there are the decisions which I have mentioned which affirm that it has not such a jurisdiction, and I am not prepared to overrule them. If the argument in support of the jurisdiction is sound, we should be brought back to all the powers which the Court of Admiralty at one time endeavoured to claim. But the Common Law Courts were superior to the Court of Admiralty; and I for one will not reopen the floodgates of Admiralty jurisdiction upon the people of this country.

I am, therefore, of opinion, that the judgment of the Divisional Court was right, that the Admiralty Court had no jurisdiction in such a case as this, and that, consequently, the county court had no jurisdiction. I think, therefore, that the decision of the Divisional Court should be affirmed.

LOPES, L.J. It seems to me impossible to add anything to the lucid and exhaustive judgment which the Master of the Rolls has just delivered, and I shall say but very few words upon this matter. The question is, has the City of London Court jurisdiction in this case on its Admiralty side? The City of London Court stands in the same position as any other county court. If that court has jurisdiction, the mandamus ought to go, calling upon the judge of the court to hear and determine

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this case; but if the court has not jurisdiction, then the order of the Divisional Court discharging the rule for a mandamus was right.

We have been led, I cannot help thinking, somewhat astray in this case; at any rate, we have been led into a very long discussion—interesting, I admit—with regard to matters which do not seem to me necessary to our decision, or, I may say, really involved in it. It was contended by the plaintiffs' counsel in their most able arguments, that the Admiralty Court had jurisdiction to try all torts happening, as it was said, on the high seas; and, therefore, it was said, the county court, the City of London Court, had that jurisdiction, and could try this particular case against a pilot. That part of the case has been fully dealt with by the Master of the Rolls, and I will not pretend for a moment to follow what he has said upon that subject. I will confine myself to that which I think is really the only question in this case, viz., whether the City of London Court, inheriting and acquiring the jurisdiction of the Admiralty Court, has jurisdiction in a case of tort like the present, in which the person against whom the suit was instituted was a pilot—a case of collision, it is true, but a case in which the defendant is the pilot. It was argued very strongly that the County Courts Acts have conferred upon the county courts a jurisdiction larger than that which was possessed by the Admiralty Court. In my opinion, the cases are clear to shew that the jurisdiction which has been conferred upon the county courts is the jurisdiction of the Admiralty Court, except in one particular which I will mention presently, but only a limited jurisdiction—a jurisdiction up to 300*l.* The cases are, to my mind, clear that no larger jurisdiction has been given to the county courts than that which was possessed by the Admiralty Court, that jurisdiction being limited to 300*l.*, and no larger jurisdiction, except with regard to charterparties, and that is a matter with which we have nothing to do now. Now, the authorities upon which reliance was placed to establish that proposition are three: *Everard* v. *Kendall* (1), *Allen* v. *Garbutt* (2), and *The Dowse* (3); and they

(1) Law Rep. 5 C. P. 428. (2) 6 Q. B. D. 165.
(3) Law Rep. 3 A. & E. 135.

go strongly, and I think conclusively, to support the proposition that no larger jurisdiction with respect to collisions has been given to the Admiralty side of the county courts than was possessed by the Admiralty Court itself. Reference has been made to *The Alina* (1), and I think that case was very well commented upon by Manisty, J., in *Allen* v. *Garbutt* (2). He says, at p. 167: "Mr. Myburgh, on the part of the plaintiff, admitted that the Court of Admiralty could not have entertained the action in question; but he contended that, according to the true construction of the Acts of 1868 and 1869, a county court, and consequently the City of London Court, can entertain it. In support of that contention he cited the case of *The Alina* (1), in the Court of Appeal, decided in February, 1880. Upon referring to that case, it will be found that it was a decision as to the effect of the Act of 1869, with reference to an action for a breach of a charterparty, as to which jurisdiction was given to the county court in express terms by s. 2, sub-s. 1, of the Act of 1869." I think that is a very accurate comment, and it shews that *The Alina* (1) is distinguishable from the present case, and is an authority that the Admiralty side of the City of London Court has no larger jurisdiction, except with regard to charterparties, than that which is possessed by the Admiralty Court itself. In *The Alina* (3), Jessel, M.R., is reported to have said: "The rule of construction, as laid down in all the cases, and notably in the House of Lords, is this, that where you have plain terms used in the enacting part of an Act of Parliament, nothing less than manifest absurdity will enable a Court to say that the ordinary and natural meaning of the terms is not the true meaning." I cannot help thinking, especially from some words which follow, that that cannot be a correct report. But if it is, with the greatest respect to Sir G. Jessel, I am unable to agree with it. I have always understood that, if the words of an Act are unambiguous and clear, you must obey those words, however absurd the result may appear; and, to my mind, the reason for this is obvious. If any other rule were followed, the result would be that the Court would be legislating instead of the properly constituted authority of the country, namely, the

(1) 5 Ex. D. 227. (2) 6 Q. B. D. 165. (3) 5 Ex. D. at p. 230.

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legislature. But, to come back to that which, to my mind, is the only question which we have now to determine, namely, whether the Admiralty Court has jurisdiction over a pilot in respect of a collision brought about by his negligence. Of course, an action can be brought against a pilot in a Common Law Court. Of that there can be no doubt. But can an action be maintained in respect of the collision against a pilot in the Admiralty Court? It seems to me that the authorities are clear that it cannot. First, there is *The Urania* (1), decided in 1861, which has been already commented upon by the Master of the Rolls. Then there is *The Alexandria* (2), decided in 1872, and *Flower* v. *Bradley* (3), decided in 1874, which both followed *The Urania*. (1) Therefore, it has been the decision of these Courts for more than thirty years that an action such as this is not maintainable in respect of a collision caused through the negligence of a pilot; and, on the other hand, there is not a single case to be found in the books, so far as I can discover (and I have carefully looked at the reports), in which it has been clearly established that the Court of Admiralty ever entertained any such claim as this against a pilot. And it appears to me, as has been already pointed out by the Master of the Rolls, that there is a very good reason for this. If an action were brought against a pilot on the Admiralty side, what would his position be? He would not be able to set up contributory negligence on the part of the plaintiff, as he would if the action were brought on the Common Law side. He would be deprived altogether of that defence as a defence in bar. And, moreover, supposing both parties were to blame, in the Admiralty Court a shipowner would be able to set off his own damage against the damage claimed from him by his opponent; but a pilot is not an owner, and therefore he would have no right of set-off. It seems to me, therefore, both on authority and for the good reasons which may be assigned for the conclusion at which the Court has on several occasions arrived, clear that an action of this kind is not maintainable on the Admiralty side of the City of London Court. The Divisional Court were right in discharging the rule nisi for a mandamus, and the appeal must be dismissed.

(1) 10 W. R. 97. (2) Law Rep. 3 A. & E. 574. (3) 44 L. J. (Ex.) 1.

KAY, L.J., read the following judgment:—The Divisional Court have refused to issue a mandamus to the judge of the City of London Court to hear an action of *Green* v. *Payne*. It was an action by the owners of a barge against a pilot, who was navigating a steamer, for damage done to their barge by a collision with the steamer, which was caused, as is alleged, by the negligence of the pilot. It was a case of compulsory pilotage; so that by the Merchant Shipping Act, 1854, s. 388, the owners of the steamer could not be made liable. The collision occurred in inland waters, within the body of the county in which the judge of the City of London Court has jurisdiction in Admiralty cases. Assuming, for the purpose of the argument, that the damage was caused by the negligence of the defendant, there would be a remedy against him in the Queen's Bench Division of the High Court. And I suppose if the damages claimed were less than 50*l.*, the proper court to sue in would be the county court, i.e., the City of London Court, in its ordinary jurisdiction. But the claim is for more than 50*l.*, and not more than 300*l.*, and it is sought to bring the action on the Admiralty side of the county court, which has jurisdiction up to 300*l.*

It is argued (1.) that by statute the county court has this jurisdiction, even if the Admiralty Court had not; and (2.) that the Admiralty Court had such a jurisdiction.

The statutes which give jurisdiction to county courts in Admiralty cases are 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, passed respectively in 1868 and 1869. By the former of these statutes, (s. 2), if it appears to Her Majesty in Council expedient that any county court "should have Admiralty jurisdiction," a district may, by Order in Council, be assigned to that court "for Admiralty purposes"; and by s. 3, any county court "having Admiralty jurisdiction" shall have jurisdiction to try and determine the following causes "in this Act referred to as Admiralty causes," viz., claims for salvage not exceeding 300*l.*; claims for towage, necessaries, or wages not exceeding 150*l.*; and "as to any claim for damage to cargo, or damage by collision—any cause in which the amount claimed does not exceed 300*l.*," or beyond these amounts when the parties so agree in writing.

This Act has no preamble; but the object being to give

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"Admiralty jurisdiction" to county courts within specified districts up to certain limited amounts, primâ facie the meaning must be to give them a jurisdiction similar to that of the Court of Admiralty—that is, in the case of collision, such a jurisdiction as that Court would have had if the collision had happened on the high seas. This construction seems to me confirmed by s. 6, which enables the High Court of Admiralty to transfer an Admiralty cause pending in a county court to the High Court of Admiralty.

"Any cause," in the quotation which I have made from s. 3 would thus mean "any Admiralty cause" in a case of collision.

The Act of 1869 is, by s. 1, to be "read and interpreted as one Act with" the Act of 1868. Sect. 2 expressly gives to any county court having Admiralty jurisdiction power to try and determine causes "as to any claim arising out of any agreement made in relation to the use or hire of any ship" not exceeding 300*l.*, and, if the parties agree, when the amount claimed is larger. By s. 3, "the jurisdiction conferred by this Act and by" the Act of 1868, "may be exercised either by proceedings in rem or by proceedings in personam." Sect. 4 provides that s. 3 of the former Act, which relates to collision cases, "shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed 300*l.*"

It was held by the Court of Appeal in *The Alina* (1), that the language of s. 2 of the Act of 1869 was so express and clear that it gave to the county court jurisdiction within its district in an action for breach of a charterparty, although the High Court of Admiralty had not such a jurisdiction. This decision was in accordance with the view of the Privy Council in *The Cargo ex Argos* (2), and it overruled the two cases of *Simpson* v. *Blues* (3), and *Gunnestad* v. *Price.* (4)

Both these decisions in *The Cargo ex Argos* (2) and *The Alina* (1) proceed upon the canon of construction of Acts of Parliament adopted by the House of Lords in the *Sussex Peerage Case* (5), that if the words of a statute are in themselves "precise and un-

(1) 5 Ex. D. 227.
(2) Law Rep. 5 P. C. 134.
(3) Law Rep. 7 C. P. 290.
(4) Law Rep. 10 Ex. 65.
(5) 11 Cl. & F. 85, at p. 143.

ambiguous . . . . the words themselves alone do in such case best declare the intention of the law-giver." The language is that of Tindal, C.J. He proceeds thus: "But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Dyer, C.J., in *Stowel* v. *Lord Zouch* (1) 'is a key to open the minds of the makers of the Act, and the mischief which they intended to redress.' "

There are no such precise and unambiguous words in either of these statutes as must compel us to come to the conclusion that it was intended by the legislature to give to county courts a larger jurisdiction in cases of collision than was vested in the High Court of Admiralty. The words of the Act of 1868 are "damage by collision," not saying damage to what or by what. But no one could doubt that the words must mean damage up to 300*l.* in such a case of collision as the High Court of Admiralty could have entertained when the collision was on the high seas. The view of the Privy Council in *The Cargo ex Argos* (2) was, that the Act of 1868 "gave to the county court no more than a portion, limited as to subject-matter and amount, of the jurisdiction then actually possessed by the High Court of Admiralty."

The Act of 1869, by s. 4, enacts, that this provision as to damage by collision "shall extend and apply to all claims for damage to ships, whether by collision or otherwise," up to 300*l.* This expresses an intention to "extend" the relief for damage by collision. But how? It extends it, in the case of damage to "ships," to damage "whether by collision or otherwise." That might, as was suggested, include damage caused to a ship when there was no actual collision, but she was forced into a position of danger and injured, perhaps wrecked, by the negligent navigation of the other ship, though they did not touch one another. The Court of Admiralty, by 3 & 4 Vict. c. 65, s. 6, had jurisdiction under such circumstances. See cases collected in Marsden on Collision, 3rd ed. p. 86, n. i.: *The Industrie* (3). This would be something beyond damage "by collision," which is all that

(1) Plowd. 369.
(2) Law Rep. 5 P. C. at p. 148.
(3) Law Rep. 3 A. & E. 303.

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is mentioned in the Act of 1868, and would come within the words "or otherwise" in the Act of 1869, and thus satisfy the expressed intention to "extend" the former Act.

It was decided in *The Alina* (1), that the Act of 1869 does by express words in one case give to the county court a larger jurisdiction than the Court of Admiralty had. But it would not be logical to infer from that a general intention to give a larger jurisdiction in all the matters to which the Act refers, when the language does not necessarily bear that construction.

If the action in this case could not have been maintained against the pilot in the High Court of Admiralty, supposing the collision to have happened on the high seas, I can see nothing in either of the statutes which compels us to hold that nevertheless these Acts give such a jurisdiction to the county courts. Reason, as well as authority, seems to point to the opposite conclusion.

Turning to the authorities, the point was so decided in *Everard* v. *Kendall.* (2) The judge of the City of London Court had made an order for the seizure of a barge propelled by oars only which had damaged by collision another such barge in the river Thames. The Court of Common Pleas issued a prohibition. Keating, J., referring to the two statutes from which I have quoted, said, at p. 430: "Notwithstanding the ingenious argument of Mr. Day, I cannot satisfy myself that it was the intention of the legislature to give the county courts a jurisdiction over Admiralty causes other than those over which the Admiralty Court has jurisdiction," and the other judges agreed with him. *The Alina* (1) was decided ten years later, and *Everard* v. *Kendall* (2) was not cited in it. But the two cases were decisions upon different sections of the statute, and *The Alina* (1) is not inconsistent with *Everard* v. *Kendall.* (2) All it decided was, that the words of the 2nd section of the Act of 1869 expressly included an action for breach of charterparty, and therefore any argument that it was not intended could not be maintained. This was pointed out and decided in the case of an action in rem for necessaries brought in the county court. Such a proceeding could not have been instituted in the Admiralty Court, because

(1) 5 Ex. D. 227. (2) Law Rep. 5 C. P. 428.

the owners were domiciled in Great Britain: 24 Vict. c. 10, s. 5. The jurisdiction was denied, following *The Dowse* (1), and a prohibition was issued, *The Alina* (2) being distinguished as referring to another section of the Act of 1869, necessaries coming within s. 3 of the Act of 1868: *Allen* v. *Garbutt.* (3) The same conclusion was come to by Sir R. Phillimore in *The Alexandria.* (4) The matter was there elaborately argued upon on appeal from the Court of Passage at Liverpool. The judge of that Court had held that he had no jurisdiction under the statutes to entertain a suit by the owners of a damaged ship against the compulsory pilot of another vessel which had come into collision with her, and Sir R. Phillimore, though apparently with some reluctance, upheld the decision. His doubt seems to have been whether ss. 7 and 35 of 24 & 25 Vict. c. 10, did not give such a jurisdiction to the Court of Admiralty, and whether, therefore, these later statutes might not have given a like jurisdiction to the county courts. These cases were followed by the Court of Exchequer in *Flower* v. *Bradley.* (5)

I think we should treat these decisions as conclusive, that the statutes of 1868 and 1869 do not give to the county courts in cases of collision any larger jurisdiction than the Court of Admiralty would have had if the collision had taken place upon the high seas.

The important question, therefore, is, had the Court of Admiralty at the time when these Acts were passed jurisdiction to entertain such an action against a pilot?

Upon this point a great number of cases have been cited, the result of which seems to be, that the Court of Admiralty from ancient times asserted and exercised in certain cases a jurisdiction in personam as well as in rem. They did so in actions against the owners of ships for damage by collision. Several cases have been referred to in Burrell's Admiralty Cases, edited by Marsden, collated from the Admiralty records. They consist of short notes, apparently made by the registrar. I instance *Pillans* v. *Sherburne*, p. 319, where the master and others were

(1) Law Rep. 3 A. & E. 135.
(2) 5 Ex. D. 227.
(3) 6 Q. B. D. 165.
(4) Law Rep. 3 A. & E. 574.
(5) 44 L. J. (N.S.) (Ex.) 1.

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sued as owners for damage by collision; *Wernam* v. *Churchwood*, p. 260, an action in personam by the owners against the master and mate—it does not appear what was the cause of action; *Strong* v. *Teesdale*, p. 269, an action by the owners of one ship against the captain of another ship—again the cause of action is not stated: the action failed; *Fletham* v. *Godfrey*, p. 298, an action by the owners of a damaged ship against the owners and master of another ship for collision, in which the defendants seem to have been condemned in damages and costs; *Cowton* v. *Cocke*, p. 298, a similar action, dismissed without costs; *Pigg* v. *Goldsburg*, p. 299, a like suit against owners and master of the ship; *Taylor* v. *Thompson*, p. 302, a personal action by owners of one ship against the master of another—the cause of action not stated; *Ewer* v. *Thirkettel*, p. 310, an action against the executrix of a deceased ship master by the owners of cargo—there the master was captain of the carrying ship: it was not a case of collision; *De Kromment* v. *Chevalier*, p. 321, where owners of one ship sued the master of another for damages for collision; the suit failed for want of proof.

In *The Volant* (1) Dr. Lushington mentions *The Triune* (2), where the vessel had been arrested, and the master, who was the principal owner, appeared. The ship was sold; the proceeds were not sufficient to pay the damages recovered. Bail had not been given. A monition was issued by Sir John Nicholl against the master for the balance, and he was imprisoned. Dr. Lushington refers also to *The Hope* (3), which came before himself. In that case bail was given, but he refused to make the master, who was a part owner, liable for the excess. *The Triune* (2) was not cited. Treating the question as an open question upon these contrary decisions, Dr. Lushington says, at p. 387: "By the ancient maritime law, the owners of a vessel doing damage were bound to make good the loss to the owners of the other vessel, although it might exceed the value of their own vessel and the freight. For the purpose of enforcing this obligation, the owners of the damaged vessel might resort either to the Courts of Common Law or to the Court of Admiralty; and, if

(1) 1 Wm. Rob. 383. (2) 3 Hagg. (Adm.) 114.
(3) 1 Wm. Rob. 154.

they preferred the latter, they had their choice of three modes of proceeding, viz., against the owners, or against the master personally, or by a proceeding in rem against the ship itself. The Court of Admiralty has jurisdiction over the whole subject-matter of damage on the high seas, and the arrest of a vessel is only one mode of proceeding." The learned judge proceeds to say that there were cases in which the ship could not be arrested, as where she had sunk or gone to a distant part of the world, and says he knows no reason why in such cases an action might not be maintained in the Admiralty Court. When the ship has been arrested, the owners appear and intervene for their interest in her, and, if bail could not be demanded beyond her value, the owners in that proceeding could not be made further responsible. He decides, on the authority of *Wilson* v. *Dickson* (1), that when the master is sued as part owner he cannot be made liable with the other part owners beyond the value of the ship and freight. He says, at page 390: "To render a master, part owner, guilty of neglect, responsible beyond the value of ship and freight, you must sue him as master in the first instance, but then you must proceed by charging him with being the cause of the damage by his misconduct, and that cannot be done directly or indirectly in another suit. . . . The master is not personally sued at all in this form of proceeding," and he declined to hold the master liable beyond the value of the ship and freight, for which bail had been given, because he was sued as owner.

Other cases of personal actions in the Court of Admiralty were referred to. In *The Ruckers* (2), a passenger brought a civil action in the Court of Admiralty for damages against the master of a ship for an assault upon the high seas. The question of the jurisdiction of the Admiralty Court was raised. A search was made for precedents, and the registrar reported that in the records, which he had searched as far back as 1730, "many instances were to be found of proceedings on damage, on behalf of persons described as part of the ship's company, against officers or others belonging to the same ship; and several against persons belonging to other ships." In the margin is added, "probably

(1) 2 B. & A. 2.

(2) 4 Ch. Rob. 73.

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sailing in company, and accidentally coming on board." Sir W. Scott would not refuse to entertain the suit, though he said, at p. 76, that "if it had appeared that the precedents had been only such as related to persons in the capacity of mariners," he should have been unwilling to appear to extend the jurisdiction. This case shews the doubt that existed as to the personal jurisdiction even against the ship-master. In *The Agincourt* (1), which was an action by a mariner against the captain for ill-treatment, damages were awarded by Lord Stowell. In *The Justitia* (2) an action by a mariner against owners for wages and for damages for bad food was sustained. In a learned judgment of Mr. Justice Story, in the Circuit Court of the United States, in *De Lovio* v. *Boit* (3), he states, at p. 406, as the result of an elaborate research, that "before and in the reign of Edward III. the Admiralty exercised jurisdiction . . . . over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas." The learned jurist maintains that this jurisdiction was not affected by the statutes 15 Rich. 2, c. 3, or 2 Hen. 4, c. 11, which restricted the Court of Admiralty from cognizance of "contracts, pleas and querelas, and of all other things done or arising within the bodies of counties, as well by land as by water." But he shews that the Courts of Common Law by the use of a fiction held cognizance over all personal causes arising on the high seas, or in foreign realms, and this jurisdiction he considers only concurrent. Very much reliance has been placed upon the dictum I have quoted from this judgment, and other like general expressions as to jurisdiction in case of torts. But it is easy to shew that there must be a limit. If you read the words literally they would include a case of slander upon the high seas. Counsel answered this by saying that they must be torts connected with maritime matters. It seems to me that there is considerable authority for holding that the Court of Admiralty did exercise a jurisdiction in personam in certain cases. It did so whenever there was a remedy by proceeding in rem; but then it limited the damages recoverable to the value of the res. It exercised a

(1) 1 Hagg. (Adm.) 271. (2) 12 P. D. 145.
(3) 2 Gallison, 398.

personal jurisdiction in the nature of a disciplinary authority, as for assaults by the officers of a ship upon the high seas, where there was no jurisdiction in rem. But this, as in *The Ruckers* (1), was done with hesitation when the plaintiff was not one of the ship's company but only a passenger, though the proceeding was against the master.

But there is no case to be found of an action in the Admiralty Court against a pilot for damages occasioned by a collision. Again occurs the objection, that his liability would be unlimited, except indeed the limit of the amount of his bond and pilotage payable to him: see Merchant Shipping Act, 1854, ss. 372, 373. One case only was referred to of an action of any kind against a pilot. That was by the master against a pilot for damages, in 1724: *Russell* v. *Hays*. (2) The pilot was pilot of the same ship of which the plaintiff was master. What was the cause of action does not appear; but, after hearing evidence and counsel, and after mature consideration, the Court decided for the defendant, and ordered the plaintiff to pay the costs, pronouncing that he had failed in proving his case.

It has not been made out to my satisfaction that an action against a pilot could have been maintained in the Admiralty Court for damages for a collision upon the high seas caused by his negligence. The absence of any precedent in the books of any action of that kind seems to me conclusive that no such action could be maintained. It is said that there is no instance of an attempt to prohibit such an action. This seems to me to prove more strongly that no such action was ever brought. There was a long struggle between the Court of Admiralty and what were then the Superior Courts, down to the time of Charles II. (see *The Cargo ex Argos* (3)), in which the Court of Admiralty was asserting a large jurisdiction which the higher Court was restraining by prohibition. But such an extent of jurisdiction as to give damages against a pilot for a collision seems never to have been attempted by them. But there are express decisions upon the point.

In *The Urania* (4), in 1861, Dr. Lushington decided that no

(1) 4 Ch. Rob. 73.
(2) Burrell's Adm. C. 307.
(3) Law Rep. 5 P. C. 148.
(4) 10 W. R. 97; 5 L. T. (N.S.) 402.

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action in personam would lie against a pilot in the Admiralty Court for damage for a collision occasioned by his default. This was followed in *The Alexandria* (1), in 1872, by Sir R. Phillimore, and again in *Flower* v. *Bradley* (2), in 1874, by the Court of Exchequer, and the same reasoning was adopted by the Court of Common Pleas in *Everard* v. *Kendall.* (3)

I am, therefore, of opinion that the action to which the mandamus relates could not be brought on the Admiralty side of the county court, and that the decision of the Divisional Court must be affirmed.

Appeal dismissed.

Solicitors: *J. A. & H. E. Farnfield*; *Lowless & Co.*

W. L. C.

C. A. 1892 *Feb.* 1.

[IN THE COURT OF APPEAL.]

BURKILL *v.* THOMAS.

County Court—Action brought in High Court—Claim not exceeding 100*l.*—*Order for Trial in County Court—"Court in which Action might have been commenced"—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 65, 74.

Sect. 65 of the County Courts Act, 1888, gives power to a judge in chambers to send actions of contract, brought in the High Court, in which the claim either did not originally exceed 100*l.*, or has been reduced in the prescribed manner to a sum not exceeding 100*l.*, for trial in the county court "in which the action might have been commenced, or in any Court convenient thereto," and by s. 74 an action may be commenced in any county court of the district in which the defendant, or one of the defendants, dwells or carries on business, or by leave of the judge or registrar, in the Court of the district in which the cause of action wholly or in part arose. An action of contract was brought in the High Court in which the claim did not exceed 100*l.* The defendant dwelt and carried on business in London, but a part of the cause of action arose in Yorkshire. On an application by the plaintiff for an order that the action might be tried in Yorkshire:—

Held, affirming the judgment of the Queen's Bench Division, that such an order could be rightly made under s. 65 of the County Courts Act, 1888, as the expression "the Court in which the action might have been commenced" included all Courts in which the action might have been commenced under s. 74 of the Act, either as of right, or by leave of the judge or registrar.

APPEAL from the judgment of the Queen's Bench Division. (4)

(1) Law Rep. 3 A. & E. 574.
(2) 44 L. J. (N.S.) (Ex.) 1.
(3) Law Rep. 5 C. P. 428.
(4) Ante, p. 99.

The action was brought in the High Court to recover a sum exceeding 50*l.*, but not exceeding 100*l.* Part of the cause of action arose in Yorkshire, and the plaintiff applied for and obtained an order at chambers under s. 65 of the County Courts Act, 1888, that the action should be tried in the county court of Yorkshire. The Queen's Bench Division affirmed the order of the judge. The defendant appealed.

Courthope Munro, in support of the appeal, was heard on the question whether the case could be remitted to a Court in which it could not have been commenced as of right without leave or agreement of the parties. He referred to *Curtis* v. *Stovin*. (1)

Ernest Pollock, contrà, was not called on.

LORD ESHER, M.R. I agree with the view taken by Mathew, J., which I understand to have been also the view taken by the Lord Chief Justice, though he gave no actual judgment on it. It is said that the power given by s. 65 of the Act to order an action commenced in the High Court to be tried in any county court "in which the action might have been commenced" is to be limited to the case in which the action might have been commenced in the county court without leave. Under s. 74, if the plaintiff gets leave, an action may be commenced in the Court in the district in which the cause of action or claim wholly or in part arose, and if the action "may be" so commenced, I cannot understand why it is not a case in which it "might have been" commenced. I do not think we ought to limit the words of the section as suggested, and the appeal must, therefore, be dismissed.

FRY, L.J. By s. 74, an action may be commenced as of right in certain Courts and by leave in certain other Courts. Whether the Court is one to which access can be had with leave or without, it is a Court in which the action "might have been" commenced. It was said that, under s. 64 of the County Courts Act, 1888, inasmuch as by that section parties may agree to bring an action in any county court, and inasmuch as whatever applies to leave of the judge applies to consent of the parties,

(1) 22 Q. B. D. 513.

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we are landed in the absurdity that every Court in the country is one in which the action "might have been" commenced. I think, however, that there is a broad distinction between the leave of the Court, which is a judicial determination, and the consent of the parties, which cannot of itself give jurisdiction. I can see no reason why the same authority which is vested in the county court under s. 74 should not be vested in a judge of the High Court upon an application under s. 65. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Crowders & Vizard, for Burtonshaw & Tovey, Doncaster.*

Solicitor for defendant: *J. J. Chapman.*

A. M.

C. A. 1891 *Nov.* 28.

[IN THE COURT OF APPEAL.]

STUMORE *v.* CAMPBELL & CO.

Practice—Attachment of Debt—Garnishee Order—Trust Fund in Hands of Garnishee—Counter-claim.

The plaintiff, as execution creditor, applied to attach money in the hands of the defendants, the garnishees. The money had been deposited by the judgment debtor with the defendants for a special purpose that had failed. The defendants claimed that the judgment debtor was indebted to them for law costs in a larger sum than that deposited with them, and that they would be entitled to counter-claim for the amount due to them:—

Held, that since, on the failure of the special purpose for which it was deposited with the defendants, the money remained in their hands subject to a trust to repay it to the judgment debtor, they could not have set up their claim to costs in answer to a demand for the return of the money, and that, therefore, it was a debt due from them to the judgment debtor which could be attached.

APPEAL from the judgment of A. L. Smith, J., on an interpleader issue.

The plaintiff, as judgment creditor of Colonel Betty, deceased, claimed to attach a sum of money in the hands of the defendants. This sum of money was intrusted by the deceased to the defendants, who were acting as his solicitors, to be handed over to the plaintiff with a bill of exchange which the deceased was to

provide, to carry out an arrangement by which the money and bill of exchange were to be taken in satisfaction of the judgment. This arrangement broke down by reason of the death of Colonel Betty before he had provided the bill of exchange, and the money remained in the hands of the defendants. The defendants had a claim for law costs against the estate of the deceased to a large amount, and they advanced this claim as an answer to the plaintiff's application for an order to attach the money in their hands. An issue was according directed to determine whether the defendants were indebted to the estate of the deceased. The learned judge was satisfied that the claim for costs was in excess of the amount of the money deposited, and he held that the defendants would be entitled to counter-claim for these costs in an action by the executors for repayment of the money deposited. He, therefore, decided that they were not indebted to the estate of the deceased, and gave judgment in their favour.

The plaintiff appealed.

W. Phipson, for the plaintiff. The defendants not handing over the deposited money on demand would be a breach of trust; and a defendant is not allowed to set up a counter-claim under such circumstances. In an action by the executors, the defendants could not, under the circumstances, raise a defence under a claim of lien: *Brandao* v. *Barnett* (1), nor could they set off the costs that might be due to them. The defendants, therefore, are indebted to the estate, and there is nothing to prevent the plaintiff attaching the debt. [He cited *Hill* v. *Smith* (2); and *Re Cullen*. (3)]

Muir Mackenzie, (with him, *R. T. Reid, Q.C.*), for the defendants. The learned judge held that there was matter which would support a counter-claim by the defendants, and also that the amount they were entitled to was greater than the deposited money. What has to be looked to is the state of accounts between the judgment debtor and the garnishee: *Sampson* v. *Seaton Railway Co.* (4); *Tapp* v. *Jones*. (5) In an action by the

(1) 12 Cl. & F. 787.
(2) 12 M. & W. 618.
(3) 27 Beav. 51.
(4) Law Rep. 10 Q. B. 28.
(5) Law Rep. 10 Q. B. 591.

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executors they would undoubtedly recover judgment, but on a counter-claim the defendants would recover judgment, and claim and counter-claim make up one action: *Westacott* v. *Bevan.* (1) As the result would be in favour of the defendants, there would be no debt to attach.

Phipson, was not called on to reply.

LORD ESHER, M.R. In this case the question is whether the defendants are indebted to the estate of the deceased. A. L. Smith, J., has decided that they are not, for reasons that I will presently notice; but I find myself unable to agree with the learned judge.

It appears that some money was placed in the hands of the defendants, who are solicitors, for a particular purpose. So long as that purpose existed there was a trust imposed on them, and they were bound, if they accepted the money at all, to employ it or lay it out in the particular way indicated by the trust. That trust failed, and the result of that failure was that another trust arose immediately to pay back the money to the person who gave it. It is admitted that, being trustees, no lien would attach in their favour, because the money was intrusted to them for a specific purpose. *Brandao* v. *Barnett* (2) is conclusive on this point. It was also admitted that there would have been no right of set-off in an action before the Judicature Acts to recover this money—such a plea would have failed, and judgment would have been for the full amount. But it was said that under the Judicature Acts they could have claimed their costs by way of counter-claim, and the learned judge has held that for this reason they were not indebted to the estate of the deceased. The Judicature Acts, as has been often said, did not alter the rights of parties, they only affected procedure, so that no set-off could now be maintained in such a case as this. Before these Acts a person having a cross-claim must have raised it by a cross-action; but these Acts have given a right to counter-claim. In some of the cases language has been used which would seem to imply that a counter-claim is sometimes in the nature of set-off and sometimes not. No doubt matter is occasionally pleaded as

(1) [1891] 1 Q. B. 774. (2) 12 Cl. & F. 787

counter-claim which is really set-off; but counter-claim is really in the nature of a cross-action. This Court has determined that, where there is a counter-claim, in settling the rights of parties, the claim and counter-claim are, for all purposes except execution, two independent actions.

If the plaintiff sustains his claim, judgment goes for him on that; and if the defendant sustains his counter-claim, judgment goes for him on that. Either claim may be reduced by set-off. But if the plaintiff succeeds in the one case and the defendant in the other, there are two judgments which are independent for all purposes except execution. Wills, J., in *Westacott* v. *Bevan* (1), has said that this Court must be taken to have held that these judgments are only separate for the purpose of determining the taxation of costs; but that is a misinterpretation of what this Court has said. Execution, as formerly in cross-actions, is issued for the balance and in favour of the one who has that balance, and this applies to the amounts recovered, and also to the costs. The view this Court has taken is not that which Wills and Vaughan Williams, JJ., attribute to it, though it is very probable that their decision in that case was right. The consequence is that the executors could have obtained a judgment, though the defendants might have had judgment on their counter-claim for a larger amount. There is, therefore, a debt due from the defendants to the estate, and the plaintiff is entitled to attach that debt under a garnishee order. The appeal must, therefore, be allowed.

Lord Esher, M.R.

LOPES, L.J. The plaintiff in this issue is a judgment creditor, and the defendants garnishees, and the question is whether money in their hands is attachable. The money was placed in the hands of the defendants for a specific purpose which failed, and on the death of the person who had placed it in the defendants' hands, his executors were entitled then and there to have that money handed back to them, and could have maintained an action for money had and received. But it is said the defendants would have had a claim in respect of costs against the estate of the deceased exceeding the amount of money that they held, and

(1) [1891] 1 Q. B. 774.

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that they could have set this up as a counter-claim against the executors. It was admitted that neither lien nor set-off could be set up, because the money was deposited for a special purpose, and, further, that a cross-action before the Judicature Acts would not have affected the executors' right to recover; but it was said that a counter-claim stands on a different footing. Those Acts did not alter, or intend to alter, the rights of parties. The power to counter-claim was introduced to prevent circuity of action. It is a matter of procedure, and does not affect rights, and, consequently, the claim of the defendants for costs against the estate is no answer to the claim of the plaintiff to attach the money that they hold at the disposal of the executors.

KAY, L.J. I also respectfully dissent from the judgment of the learned judge. The deposit of this money was for a special purpose which has failed. It has remained in the hands of the defendants, and the judgment creditor is attempting to attach it. The defendants were the solicitors of Colonel Betty, and the learned judge has held that they are not indebted to his estate. He arrived at this conclusion in this way. It was admitted that the defendants could not assert a right of lien or a set-off, because, the fund having been deposited with them for a special purpose, when that failed they were bound to pay it back. But he held, that although they could not avail themselves of either lien or set-off in answer to a demand for the money, they might counter-claim for the amount of costs due to them, and, as their counter-claim would exceed the amount deposited with them, they were not indebted. Try that by the simplest test. Assume that they had a claim for a liquidated amount against the estate, which, but for the special purpose relating to the fund deposited, they might have set off against the demand for its return, can it be said that while they cannot limit by set-off the title of the executors to recover, they could acquire a right to do so by bringing a cross-action? This clearly cannot be. But then it is said the Judicature Acts have given a right to do that which before those Acts could not be done either by set-off or cross-action. All that those Acts have done in respect of a counter-claim is to allow a cross-action to be brought and tried at the same time as

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the original action. This is for the general convenience and to prevent the necessity for trying the actions separately, with all the attendant cost of doing so. If, then, before the Judicature Acts the defendants would have been bound to restore this money, notwithstanding they had a claim for a liquidated sum larger than the amount deposited, and if they can neither assert a lien or set-off by reason of the nature of the deposit, it seems to follow a multo fortiori that they cannot set up this claim to costs in answer to a demand for the return of the money. The judgment creditor can, therefore, enforce his claim to attach it, because there is no other claim at law or in equity which can have any priority over his.

Appeal allowed.

Solicitor for plaintiff: *Granville Layard.*

Solicitors for defendants: *Campbell, Reeves, & Hooper.*

A. M.

PALMER *v.* PALMER.

1892 *Jan.* 27.

Practice—Pleading—Action for Recovery of Land—Claim as Heir-at-law—Particulars—Order XIX., *r.* 7.

In an action for the recovery of land the statement of claim alleged merely that the plaintiff was entitled to possession as heir-at-law of B., who died seised in fee of the premises and intestate:—

Held, that the defendant was entitled as of course to particulars shewing the links of relationship on which the plaintiff relied as constituting him such heir.

APPEAL from chambers.

In an action for the recovery of land the statement of claim alleged that the plaintiff was heir-at-law of Mary Ann Brown, who died intestate seised in fee of certain lands, &c., known as The Lakes, &c., and the said estate descended to the plaintiff as such heir, and that he was entitled to possession. Upon a summons taken out by the defendant for particulars under Order XIX., r. 7, the master ordered the plaintiff to furnish particulars of how he claimed to be heir-at-law of Mary Ann Brown, shewing the links of relationship upon which he relied

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as constituting him her heir. The order was affirmed by the judge.

The plaintiff appealed.

Maurice Hill, for the plaintiff. It is sufficient for the plaintiff to allege that he is heir-at-law. The question as to the persons through whom he derives his heirship is a mere question of evidence, and the defendant is not entitled to particulars of those persons. The case of *Philipps* v. *Philipps* (1) is not an authority against the contention that an averment of heirship is sufficient; for there the plaintiff did not claim merely as heir-at-law of one definite person, but as heir-at-law of several persons alternatively, and also alternatively as heir male of the body, and as residuary devisee under a former owner's will. The claim there was clearly embarrassing and was rightly ordered to be struck out. In *Evelyn* v. *Evelyn* (2), which was decided subsequently to *Philipps* v. *Philipps* (1), Malins, V.-C., held, distinguishing that case, that a statement of heirship to one definite person was enough, and refused to strike it out as embarrassing.

[DENMAN, J. The question whether a statement of claim should be ordered to be struck out is one thing; it is another question whether reasonable particulars should be ordered.]

A. K. Loyd, for the defendant, was not called upon.

DENMAN, J. The sole question in these cases is what is fair and reasonable notice to the defendant of the case that he has got to meet. All that the plaintiff alleges is that Mary Ann Brown was at the time of her death seised in fee and that he is her heir-at-law. That does not give the defendant sufficient information. In my judgment, the master and judge were perfectly right in ordering the particulars which were asked for. The case of *Evelyn* v. *Evelyn* (2), which was cited as an authority for the proposition that a statement of claim framed in the general terms in which the present claim is framed will not be struck out, does not affect the question of the defendant's right to particulars.

(1) 4 Q. B. D. 127.

(2) 28 W. R. 531.

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CAVE, J. I am of the same opinion. We are not in this case asked to decide whether the facts on which the plaintiff relies as shewing his heirship to Mary Ann Brown should have been set out in the claim; though, speaking for myself, I should think that they ought to have been set out, and that omission to set them out renders the claim liable to be struck out. But that is not the question here. Here the only question is whether particulars ought to be given. I am clearly of opinion that they ought.

Appeal dismissed.

Solicitors for plaintiff: *Phipps & Watkins, for A. E. Phipps, Northampton.*

Solicitors for defendant: *Warren, Gardner, & Murton, for Lamb & Stringer, Kettering.*

J. F. C.

TASSELL *v.* HALLEN.

Jan. 13.

Practice—Writ of Summons—Service out of the Jurisdiction—Action for Breach of Covenant to Repair—Contract affecting Land . . . . sought to be enforced—Order XI., *r.* 1 (*b*), (*g*).

An action against the assignee of a lease for breach of a covenant to repair contained in the lease, is an action in which a contract or liability affecting land or hereditaments is sought to be enforced within the meaning of Order XI., r. 1 (*b*). Service of the writ of summons out of the jurisdiction may, therefore, be allowed in such an action where the land is situate within the jurisdiction.

Agnew v. *Usher* (14 Q. B. D. 78) distinguished.

Kaye v. *Sutherland* (20 Q. B. D. 147) followed.

The sub-sections of Order XI., r. 1, are to be read disjunctively, and each of such sub-sections is complete in itself and is independent of the others.

MOTION to set aside an order for leave to serve a writ of summons out of the jurisdiction.

The action was brought against three defendants, to recover—(1.) Possession of a piece of land and buildings situate in the County of Middlesex; (2.) Damages for breach of a covenant to repair the premises; and (3.) Rent and mesne profits. The plaintiffs alleged that they were entitled to the reversion in the premises under a lease granted by one Hayward to one Beaumont, whose right and interest under the lease became, in 1879, vested

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in two of the defendants, A. W. Hallen and G. M. Custance; that the said defendants in March, 1891 assigned the lease to the third defendant, J. Gibbons; that the defendants, Hallen and Custance, had during the time that they were in possession of the premises committed breaches of the covenant to repair contained in the lease; and that the defendant Gibbons had since the assignment to him committed similar breaches.

This was a motion by the defendant Hallen, by way of appeal from the decision of Wright, J., at chambers, refusing to set aside an order obtained by the plaintiffs, giving them leave to issue the writ of summons and to serve the same out of the jurisdiction upon the said defendant in Scotland, where he was ordinarily resident.

The order giving leave to issue and serve the writ was made upon October 22, 1891, and the writ was issued upon the following day, and was subsequently served upon the defendant Hallen, in Scotland.

W. E. Ball, for the defendant Hallen. If the order purports to have been made under Order XI., r. 1 (*g*), it is bad, because that rule requires that the action should be brought against some other person "duly served"—that is, who has at the time of the application for leave been duly served—within the jurisdiction. Here the order was obtained a day before the issue of the writ. The order could not have been properly made under rule 1 (*b*) because the defendants Hallen and Custance have assigned their interest to the defendant Gibbons, and, therefore, as against them the action is merely one for damages for breach of the covenant to repair. As against Hallen, therefore, the action is not one to enforce a contract, nor does the contract, in so far as the covenant to repair is concerned, affect the land or hereditaments within the meaning of rule 1 (*b*), because as against this defendant the claim is merely one for payment of money: *Agnew* v. *Usher*. (1)

[LORD COLERIDGE, C.J., referred to *Kaye* v. *Sutherland*. (2)]

This case falls within rule 1 (*e*), not (*b*); there must be some difference between the two expressions "sought to be . . . . en-

(1) 14 Q. B. D. 78. (2) 20 Q. B. D. 147.

forced in the action" in rule 1 (*b*), and "founded on any breach . . . . of any contract" in rule 1 (*e*). Even if it is within (*b*) this case also falls under (*g*), and, therefore, the other defendants should have been served before the application for leave, because these sub-sections are not mutually exclusive.

A. G. M'Intyre, for the plaintiffs. Each of the sub-sections of Order XI., r. 1, is independent and complete in itself, and creates a separate jurisdiction to grant leave: *Kaye* v. *Sutherland*. (1) Even though this case might fall within rule 1 (*g*), yet if it also comes under (*b*) the plaintiffs are not driven to rely on (*g*). The covenant to repair is a contract affecting land, and in suing for a breach of it the plaintiffs are seeking to enforce that contract.

LORD COLERIDGE, C.J. This case, like many others under Order XI., r. 1, is important and by no means easy. The whole question depends on the words of the rule, which has the force of an Act of Parliament. The very words "service out of the jurisdiction of a writ of summons may be allowed . . . . whenever," &c., shew that by virtue of the rule the Court or judge is given power to do something which otherwise they would not have power to do. For the power of the Court is limited to the territorial area of its jurisdiction, and it cannot in general affect persons who are outside that area. It is necessary, therefore, to consider carefully the words of the rule. Here the subject-matter of the action is a covenant in a deed relating to certain land and buildings in Middlesex. It is said by the plaintiffs that that covenant has been broken. It is a covenant to repair buildings situate in Middlesex. Undoubtedly, therefore, the subject-matter of the action is English. But one of the defendants is domiciled in Scotland, and is therefore primâ facie not within the jurisdiction of the English Courts. It is said by the plaintiffs that the case falls within one of the sub-sections of this rule, whereby in a number of cases service of a writ of summons out of the jurisdiction is authorized. They are all separate instances coming under the general head, "service out of the jurisdiction . . . . may be allowed . . . . whenever," &c.;

(1) 20 Q. B. D. 147.

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and at the end of each of the separate heads allowing such service the disjunctive "or" occurs. Thus sub-s. (*f*), which is not material in this case, ends with "or," and then follows sub-s. (*g*), which provides that such service may be allowed whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

In this case an order for service of the writ out of the jurisdiction upon this defendant was obtained before the issue of the writ, and of course, therefore, before the other defendants who were within the jurisdiction were served. Therefore, it is argued, that the case does not fall within sub-s. (*g*), because under that sub-section the action must be brought against some other person "duly served within the jurisdiction," and that must mean some person who has been already served with the writ. It was certainly so decided by Pearson, J., a judge for whose decisions I have the greatest respect, who expressly held, in *Yorkshire Tannery Co.* v. *Eglington Chemical Co.* (1), that this sub-section applied only where at the time of making application for leave the defendant within the jurisdiction had been served with the writ. Therefore, if we should decide in this case that service of this writ was rightly allowed under sub-s. (*g*), we should be in direct conflict with that decision of Pearson, J. I do not wish to conceal that, although it is not my present opinion that Pearson, J., was wrong in the view which he took of this sub-section; yet I think that, after a full argument upon the point, the Court might come to a different conclusion; because it seems to me that that learned judge's decision might lead to the absurd conclusion that if all the important defendants were out of the jurisdiction, but there happened to be one defendant within the jurisdiction, the whole proceedings would be delayed until he was served, although he might be a mere man of straw against whom no substantial relief could be obtained. Further than that, I cannot help also observing, that this construction of the rule necessitates the insertion of the words "has been" before the words "duly served." However, it is not necessary to decide that point in this case. For all the sub-sections are disjunctive, and if a defendant comes within

(1) 33 W. R. 162.

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any one of the sub-sections the rule applies, and there is jurisdiction to make the order for service. Now, I am clearly of opinion that this case falls within sub-s. (*b*). That is to say, it is sought in this action to enforce a liability affecting land or hereditaments situate within the jurisdiction. We need not, therefore, consider sub-s. (*g*); it is enough that sub-s. (*b*) here authorizes the service of the writ.

Under sub-s. (*b*) there have been two cases which, at first sight, it appears difficult to reconcile with one another. In *Agnew* v. *Usher* (1) it was held that an action for rent against persons sued as assignees of a lease, but who alleged that the assignment was to secure a debt, was not within sub-s. (*b*), because it was a mere personal action for a sum of money and was not to enforce a contract, obligation, or liability affecting land. That case came under consideration in *Kaye* v. *Sutherland* (2); but I believe it to be good law. In my opinion, there is no conflict between the two cases. *Kaye* v. *Sutherland* (2), however, is exactly like this case. There, the defendant resided in Scotland, and the writ was indorsed with a claim for tenant right and tenant's compensation in respect of a farm in Yorkshire and for breach of an agreement to pay tenant right and tenant's compensation. The Court held, therefore, not only that an action as to tenant right was within sub-s. (*b*), but also that as to damages for breach of the agreement the action was within that sub-section. It is impossible to distinguish that case from this. I could understand that it might have been argued that *Kaye* v. *Sutherland* (2) was distinguishable if the question there had been one of tenant right in a limited sense of the term; as for example, of a right to a way-going crop—for that would be a matter clearly affecting the land; but an agreement to pay compensation is a personal agreement, and that was held in *Kaye* v. *Sutherland* (2) to be within sub-s. (*b*). It seems to me, therefore, that both upon the construction of Order XI., r. 1, and upon the authorities, service of this writ was properly allowed under sub-s. (*b*). I am not prepared to say that it might not have been allowed also under sub-s. (*g*), but I prefer not to decide that point.

(1) 14 Q. B. D. 78. (2) 20 Q. B. D. 147.

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COLLINS, J. I am of the same opinion. It has been contended that this case falls within sub-s. (*g*), and that sub-section only. If that were so, then the decision of Pearson, J., in *Yorkshire Tannery Co.* v. *Eglington Chemical Co.* (1), and the general course of practice in judges' chambers, would be against the plaintiffs. I quite feel the force of my Lord's observations as regards the possible consequences of that decision; but it should be borne in mind in construing these provisions disjunctively that they should be construed strictly, because it is a rule giving jurisdiction over persons who would not otherwise be subject to this Court. That, I think, is the view which Pearson, J., meant to take in deciding that sub-s. (*g*) intended to make service of the writ within the jurisdiction at some time or other before the application for leave, a condition precedent to an order under that sub-section. To begin with, the word "served" is a past participle, and although to give full effect to the provision it would be better to construe it differently yet that would necessitate the insertion before "served" of some such words as "about to be." However, I do not think it necessary to decide this point as to sub-s. (*g*) This case clearly falls within sub-s. (*b*) It is an action upon a covenant to repair, and at common law such a covenant touches and runs with the land. We have here, therefore, a covenant affecting hereditaments situate within the jurisdiction. Then the only other question left open is, is that covenant sought to be enforced in this action? But, as my Lord has pointed out, the case of *Kaye* v. *Sutherland* (2) is directly in point upon this. There the plaintiff sought, not only a remedy in respect of the tenant right, but also damages for breach of the agreement to pay compensation. Therefore, *Kaye* v. *Sutherland* (2) really decides this point.

Motion dismissed.

Solicitors for plaintiffs: *Paterson & Sons, for Garner, Uxbridge.*

Solicitors for defendants: *Walker & Battiscombe, for Garrood, Ledbury.*

W. J. B.

(1) 33 W. R. 162.

(2) 20 Q. B. D. 147.

IN RE ARMSTRONG. EX PARTE LINDSAY. 1891 Aug. 4, 7.

Bankruptcy—Contempt of Court—Refusal of Witness summoned under s. 27 of the Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *to submit to Examination—Motion for Committal—Civil Process—Privilege of Parliament—Bankruptcy Rules*, 1886, *rr.* 70, 88.

On motion by a trustee in bankruptcy to commit a member of Parliament to prison for contempt of Court in having refused to submit to examination touching the bankrupt's affairs, when summoned for that purpose under s. 27 of the Bankruptcy Act, 1883, the witness claimed privilege of Parliament:—

Held, that as the order of committal would be in its nature, not punitive, but a civil process to enforce obedience to the order of the Court, an attachment would not lie, and that the witness was privileged from arrest.

THIS was a motion to commit Mr. Isaacson, a member of Parliament, to prison for contempt of Court in having refused to be examined on oath, pursuant to a summons issued by the Bankruptcy Court.

The summons referred to was a summons issued on May 29, 1891, under s. 27 of the Bankruptcy Act, 1883, and it was issued pursuant to the order and request of the Sheriff Substitute of Roxburghshire, in a Scottish bankruptcy, under the provisions of ss. 117 and 118 of the Bankruptcy Act, 1883.

Mr. Isaacson, having been served with a sealed copy of this summons, did not attend on the day appointed for his examination; but his solicitor applied for and obtained an adjournment until July 13, on the ground of the condition of his health, as appeared by a doctor's certificate.

On July 13 Mr. Isaacson attended before the registrar as appointed, but refused to submit to examination on the ground of certain alleged technical irregularities in the proceedings against him, which do not call for a report.

The registrar thereupon ordered the examination to proceed, and formally required Mr. Isaacson to be sworn and to submit to examination; but he, acting under advice of his counsel, refused to be sworn.

The trustee in bankruptcy then applied to the Court to commit Mr. Isaacson to prison for contempt of Court.

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Firminger, for the application.

A. Young, for Mr. Isaacson. This application is in the nature of a civil process, and as Mr. Isaacson is a member of Parliament, which is now sitting, he is privileged from arrest: *In re Anglo-French Co-operative Society* (1); *Goudy* v. *Duncombe*. (2)

Firminger, in reply. Privilege of Parliament is no protection where the contempt partakes of a criminal character: *Long Wellesley's Case*. (3) Having regard to the object of s. 27 of the Bankruptcy Act, 1883, the offence of disobeying the order of the Court must be taken to have been of a criminal nature: *In re Gent, Gent-Davis* v. *Harris* (4); *In re Freston*. (5)

Cur. adv. vult.

Aug. 7. VAUGHAN WILLIAMS, J. (after dealing with and overruling the technical objections, held that Mr. Isaacson was bound to submit himself for examination, and was guilty of contempt in refusing to do so, and continued):—But another objection is that Mr. Isaacson, being a member of Parliament, the order of committal prayed for cannot be made against him by reason of privilege of Parliament. I think this objection is well founded. The rule in the matter of privilege, I take it, is that which was laid down by Lord Brougham in *Long Wellesley's Case* (6), where he says: "The line, then, which I draw is this: That against all civil process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not; that he who has privilege of Parliament, in all civil matters which, whatever be the form, are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege; that members of Parliament are privileged against commitment, quâ process, to compel them to do an act; against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance; that in

(1) 14 Ch. D. 533.
(2) Law Rep. 1 Ex. 430.
(3) 2 Russ. & My. 639.
(4) 40 Ch. D. 190.
(5) 11 Q. B. D. 545.
(6) 2 Russ. & My. 639, 665.

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all such matters members of Parliament are protected; but that they are no more protected than the rest of the King's subjects from commitment in execution of a sentence, where the sentence is that of a Court of competent jurisdiction and has been duly and regularly pronounced. Now, convictions, and the sentences that follow upon them, are of two sorts: either formally, upon trial, by indictment or information and verdict, with the consequent judgment, or summarily, but as legally, as formally, by a commitment for contempt, where there is no other punishment provided, and no other mode of trying the offence." This rule seems also to have been acted on by Hall, V.C., in *In re Anglo-French Co-operative Society* (1), where a motion was made for the attachment of a member of Parliament for contempt in not obeying an order of the Court to pay certain moneys to the liquidator of the company. The result is, that the question before me is whether this motion is made to punish Mr. Isaacson, or merely in the nature of attachment for contempt as a means of enforcing obedience to the order of the Court. I think that it is the latter. I think it is merely a process to compel performance. It is true that this proceeding is not an attachment in a technical sense, but an application for committal. It is true that the arrest of Mr. Isaacson could not be brought about without a second order beyond the order for his examination, which he disobeyed. But I think the committal, if ordered here, would not be punitive, but merely civil process. I do not say that a witness may not so refuse in open Court to answer questions he is ordered to answer as that it may amount to personal contempt, and be punishable as such in the exercise of the inherent common law jurisdiction of the Court, or under the provisions of rule 70 of the Bankruptcy Rules, 1886, which says: "Any person wilfully disobeying any subpœna or order requiring his attendance for the purpose of being examined, or producing any document, shall be deemed guilty of contempt of Court, and may be dealt with accordingly." But I do not think in the present case there is any element of personal contempt, or any offence committed for which Mr. Isaacson could be sent to prison as a punishment. I think that any imprisonment ordered

(1) 14 Ch. D. 533.

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in the present case would be by way of civil process, and would determine ex debito justitiæ as soon as the person committed yielded obedience to the order of the Court and paid the costs. I may observe, that it seems clear rule 70 of the Bankruptcy Rules, 1886, and not rule 88, is the basis of the present application; but my observations would apply equally if rule 88 was the basis of the application, because the terms of rule 88 are: "If a debtor or witness examined before a registrar refuses to answer to the satisfaction of the registrar any question which he may allow to be put, the registrar shall report such refusal in a summary way to the judge; and upon such report being made, the debtor or witness in default shall be in the same position, and be dealt with in the same manner, as if he had made default in answering before the judge." If one looks at the Bankruptcy Act, 1883, it is plain that the framers had present to their minds the distinction between the two kinds of contempt—the distinction between process and punishment. Sect. 16, sub-s. 4, s. 24, sub-s. 4, and s. 50, sub-s. 6, for example, deal with various offences, and in them the Act speaks not only of the offender being dealt with as for contempt of Court, but says the offender shall be punishable. For these reasons, I am of opinion that the motion must fail, and must be dismissed with costs.

Order accordingly.

Solicitors: *Harries, Wilkinson, & Raikes*; *Waldron, Lawrence, & Baker.*

H. L. F.

IN RE DUNCAN. EX PARTE DUNCAN. 1891 Nov. 6.

Bankruptcy—Official Receiver the Trustee—No Committee of Inspection—Employment of Solicitor—Taxation of Costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52) *ss.* 22 (*sub-s.* 9), 57 (*sub-s.* 3), *and* 66—*Bankruptcy Rules*, 1886, *rr.* 117, 337.

When the official receiver is trustee without a committee of inspection, and desires to exercise any of the powers mentioned in s. 57 of the Bankruptcy Act, 1883, he must obtain, like any ordinary trustee, the special authority of the Board of Trade for the particular act or thing proposed to be done.

APPLICATION to review the taxation of costs.

In September, 1890, L. F. Duncan was adjudicated a bankrupt on the petition of a judgment creditor, and the official receiver became the trustee without a committee of inspection.

In March, 1891, all the bankrupt's debts having been paid in full, the bankruptcy was annulled.

During the bankruptcy, the official receiver employed Messrs. Hatchett, Jones, & Co., a firm of solicitors, to do certain work and conduct certain proceedings connected with the bankruptcy, and approved the bills of costs which they sent in to him, subject to taxation. The bankrupt attended the taxation before the taxing master, and objected to certain items being allowed on the ground that the solicitors were not duly authorized, as required by sub-s. 3 of s. 57 of the Bankruptcy Act, 1883, to do the work charged for in such items, and that no copy of any resolution or other proper authority sanctioning the employment of the solicitors to do the said work was produced to the taxing master before or at the time of the taxation, as required by rule 117 of the General Rules.

The master overruled the objection, being of opinion that, as the official receiver was trustee and committee of inspection in the matter, the authority given by him to the solicitors from time to time, as evidenced by his notes on the bill of costs, was a sufficient compliance with the Act and rule.

The bankrupt thereupon applied to the Court to review the master's taxation.

S. Woolf, Q.C., and *Ringwood*, for the bankrupt. Under s. 57

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of the Bankruptcy Act, 1883, a trustee must obtain the express authority of the committee of inspection for the employment of a solicitor, and where there is no committee of inspection their powers are, by s. 22 of the Act, vested in the Board of Trade. Therefore the official receiver, when trustee without a committee of inspection, must obtain the express authority of the Board of Trade for anything he wishes to do under s. 57, for he is in the same position as any other trustee, and s. 117 of the Bankruptcy Rules, 1886, which is general in its terms, does not relieve him from this duty. Therefore, unless the express authority of the Board of Trade is produced, these costs cannot be allowed.

Muir Mackenzie, for the solicitors. The official receiver was not bound to produce the express authority of the Board of Trade. Under s. 66 of the Act the official receiver is an officer of the Board of Trade, and acts "under the general authority and direction of the Board," and by r. 337 of the Bankruptcy Rules, 1886, "where there is no committee of inspection, any functions of the committee of inspection which devolve on the Board of Trade may, subject to the directions of the Board, be exercised by the official receiver." Here the official receiver was himself both the trustee and committee of inspection, and it was not necessary for him to produce any particular authority when acting under the general direction of the Board. But if it be necessary, the solicitors ask that the matter may stand over that evidence of the express direction of the Board may be produced: *In re Johnstone.* (1)

S. Woolf, Q.C., in reply.

VAUGHAN WILLIAMS, J. It may be that the official receiver in this case had the direct authority of the Board of Trade, and so what I am about to say does not necessarily conclude this matter. I certainly think that in cases such as this the permission of the Board of Trade must be obtained. I do not assent to the construction that the solicitors seek to put on r. 337 of the Bankruptcy Rules, 1886. In my opinion, when the official receiver is the trustee, he must comply with s. 57 of the Bankruptcy Act, 1883, and r. 117 of the Bankruptcy Rules,

(1) 2 Morr. 206.

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1886, just as much as if he were an ordinary trustee in bankruptcy and not the official receiver. Therefore, unless it can be shewn that there was an express affirmative direction from the Board of Trade, either in writing or verbally, as in the case of *In re Johnstone* (1), these costs cannot be allowed. As the solicitors ask for an adjournment to prove that the express directions of the Board of Trade were obtained for what was done, I will follow the course that was adopted in *In re Johnstone* (1), and allow this application to stand over in order that evidence may be produced of the direct instructions given by the Board of Trade.

Order accordingly.

Solicitors: *Leggatt, Rubenstein & Co.; Hatchett, Jones & Co.*

H. L. F.

NORTH *v.* BASSETT.

Nov. 18.

Building Contract—Charges of Quantity Surveyor—Liability of Builder—Usage.

The plaintiff, a quantity surveyor, was employed by an architect to take out the quantities for a building about to be erected; the defendant, a builder, tendered for the work upon the basis of a specification, containing the following clause: "To provide for copies of quantities and plans, 25 guineas to be paid to the surveyor" (naming the plaintiff) "out of the first certificate." The defendant's tender was accepted, and he received the first instalment of the price of his work from the building owner. In an action by the plaintiff to recover the 25 guineas according to the specification, evidence was given that, by the usage of the building trade, the builder whose tender was accepted was liable to the quantity surveyor for the amount due for the quantities; but that if no tender was accepted the building owner or architect was liable:—

Held, that the usage was reasonable and valid, and that there was evidence of a contract with the plaintiff upon which he was entitled to recover.

APPEAL of the plaintiff from a judgment of non-suit entered by the assistant judge of the Mayor's Court. The facts proved at the trial were in substance as follows:—

The plaintiff, who was a quantity surveyor, was employed by an architect to take out the quantities under a specification for a building about to be erected; the specification contained the

(1) 2 Morr. 206.

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following clause: "To provide for copies of quantities and plans, twenty-five guineas to be paid to the surveyor, D. H. North, out of the first certificate." The defendant, a builder, tendered for the erection of the building upon the basis of this specification, and his tender was accepted; in due course the defendant was paid a cheque for the amount of the first instalment, but refused to pay the plaintiff the twenty-five guineas provided for by the specification, and this action was brought by the plaintiff to recover that amount. At the trial evidence was given of a usage in the building trade, that in the event of a tender being accepted the builder whose tender was accepted was liable to the quantity surveyor for his fees; while if no tender was accepted, the building owner or architect was liable. The learned judge, being of opinion that there was no privity of contract between the plaintiff and defendant, and that the case was governed by *Priestley* v. *Stone* (1), non-suited the plaintiff.

Hawtin, for the plaintiff. The usage is valid. By tendering on the basis of a specification which provides for the payment of the quantity surveyor's fees by the builder, the latter impliedly contracts to pay those charges in the event of his tender being accepted, and the case is not within *Priestley* v. *Stone* (1), which merely decided that an action of tort would not lie by the builder against the quantity surveyor to recover damages for negligently taking out the quantities.

[He cited *Moon* v. *Witney Guardians* (2); *Young* v. *Smith*. (3)]

J. F. P. Rawlinson, for the defendant. The question of money had and received did not arise in the Court below, where the case proceeded entirely upon the ground of usage. It is clear from the decision of the Court of Appeal in *Priestley* v. *Stone* (1), that in such a case as the present there is no privity of contract between the builder and the quantity surveyor, and that a usage for the latter to look to the former for the payment of his charges is bad. The plaintiff has sought to recover upon the contract as amplified and extended by the usage; but he is not a party to the contract, and the usage has been held bad by the Court of Appeal.

(1) 4 Times Rep. 730. (2) 3 Bing. N. C. 814.
(3) Unreported, but referred to in Hudson on Building Contracts, at p. 784.

[He cited *Bradburn* v. *Foley* (1); *Thorn* v. *Mayor of London* (2); *Johnson* v. *Lindsay*. (3)]

MATHEW, J. I am of opinion that this appeal must be allowed. I am convinced that the Court of Appeal in *Priestley* v. *Stone* (4) never meant to say that the usage set up in this case was a bad one; had they so decided I should have been bound by their decision. This case is totally different, and the question we have to determine is, whether there was any evidence of a liability on the part of the defendant to the plaintiff. The plaintiff was a quantity surveyor employed by an architect to take out the quantities for a building, for which the defendant's tender was ultimately accepted, and I agree with Field, J., in *Young* v. *Smith* (5), that the result of such employment is that there is not a contract by the building owner to pay the quantity surveyor in any event, but that the latter is to be paid by the builder if his tender is accepted. In the present case the quantity surveyor prepared and took out the quantities; the builder tendered for the work, and the quantity surveyor put upon the face of the quantities a statement that his fees were to be paid by the builder when they were received from the owner; the builder accepted the quantities, and assented to the term imposed. What is the usage which upon these facts it is sought to set up? It is one which I should have thought to be notorious: a usage that the fees of the quantity surveyor are paid by the builder whose tender has been accepted by the building owner. This is a sensible and convenient usage; it brings all the people together, the builder, the building owner, and the quantity surveyor, and they all assent to it. In the present case that this course was followed is corroborated by the documents, which contain abundant evidence of a promise to pay on the part of the defendant; while the assent of the plaintiff is clearly shewn by his bringing this action. Under the circumstances, as the non-suit proceeded upon a point not raised by the parties themselves but by the judge, and as the real

(1) 3 C. P. D. 129.
(2) 1 App. Cas. 120.
(3) [1891] A. C. 371.
(4) 4 Times Rep. 730.
(5) Unreported, but referred to in Hudson on Building Contracts, at p. 784.

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question at issue between them has never been tried, there must be a new trial.

A. L. SMITH, J. I am of the same opinion, though I am not surprised that the learned judge was misled by the case in the Court of Appeal which was cited to him. That case was, however, a very different one to the present, though there are certain expressions in the judgments of the two Lords Justices which are perhaps open to comment. The question there was, whether there was any such privity between the quantity surveyor and the builder that the one could sue the other for tort; it was held that there was not, and in that decision I agree. But that is not this case. Over and over again have I seen this notorious usage proved, that the builder pays the quantity surveyor and puts the amount of the fees upon the amount of his tender. First of all, the building owner agrees to hand over the money for the quantity surveyor's fees to the builder, and the builder agrees to hold it for the quantity surveyor, and the latter agrees that he shall hold it. This kind of tripartite agreement is a sensible and convenient one. In my opinion, the case is not within *Priestley* v. *Stone* (1), and in a case like the present the quantity surveyor can maintain an action for his fees against the builder.

Order for a new trial.

Solicitor for plaintiff: *J. R. Pakeman.*
Solicitors for defendant: *Langlois & Biden.*

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(1) 4 Times Rep. 730.

[IN THE COURT OF APPEAL.]

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1892
Jan. 22.

MARGETSON *v.* GLYNN.

Ship—Bill of Lading—Construction—Liberty to deviate from specified Voyage —Extent of Deviation authorized.

In an action by shippers of goods against the shipowners for damage to the goods, it appeared that the goods were shipped under a bill of lading, which stated that the goods (oranges) were shipped on board the defendants' steamer, "now lying in the port of Malaga, bound for Liverpool, with liberty to proceed to and stay at any port or ports, in any rotation, in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever."

After the oranges had been shipped at Malaga, the ship, instead of going direct to Liverpool, went first to Burriana, a port on the north-east coast of Spain, about two days' steam from Malaga, and afterwards returned and proceeded to Liverpool. By reason of the delay thus occasioned, the oranges were in a rotten state when they arrived at Liverpool:—

Held, that the general words of the bill of lading must be limited with reference to the specified voyage, and that they only allowed the ship to proceed to ports which were fairly and substantially in the ordinary course of the voyage; that they did not justify the actual deviation; and that the defendants were liable.

MOTION by the defendants for a new trial, or that judgment might be entered for them.

At the trial before Hawkins, J., it appeared that the action was brought by shippers of oranges against the shipowners, claiming damages for breach of the contract contained in the bill of lading by reason of which the oranges were damaged.

The bill of lading stated that the goods were shipped on board the steamship *Zeta*, "now lying in the port of Malaga, bound for Liverpool, with liberty to proceed to and stay at any port or ports, in any rotation, in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever." The oranges were shipped at Malaga, and the ship then, instead of going to Liverpool direct, went first to the port of Burriana, which is on the north-east coast of Spain, and then back again,

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and proceeded to Liverpool. A delay of some days was thus caused, and the consequence was that the oranges when they arrived at Liverpool were in a rotten condition. The defendants justified the delay by the terms of the bill of lading. The learned judge held that the general words in the bill of lading did not authorize such a deviation from the direct voyage from Malaga to Liverpool, and gave judgment for the plaintiffs.

Bigham, Q.C., and *H. F. Boyd*, for the defendants. The learned judge put a wrong construction upon the bill of lading, and judgment ought to be entered for the defendants. The words of the bill of lading justify the deviation from the direct course which was caused by going to Burriana. *Leduc* v. *Ward* (1) is distinguishable. The object of the liberty which is given to call at different ports is to enable the shipowner to fill up his vessel. It enables him to call at any of the ports to which ships engaged in the Mediterranean trade are in the habit of going, and this is the common form of bill of lading used in that trade. A discretion is left to the shipowner, and he may be trusted not to do that which would injure the goods of his customers. The ship is at liberty to go to any port which may be reasonably considered to have been in the contemplation of the parties.

[BOWEN, L.J., referred to *Gairdner* v. *Senhouse* (2); *Mellish* v. *Andrews*. (3)

Gorell Barnes, Q.C., for the plaintiffs, referred to *Lambert* v. *Liddard* (4); *Hogg* v. *Horner*. (5)]

The earlier cases on policies of insurance are in favour of the defendants' construction: Arnould on Marine Insurance (5th ed.), vol. i. p. 471, et seq.

Gorell Barnes, Q.C., and *C. C. Scott*, for the plaintiffs, were not heard.

LORD ESHER, M.R. I think we ought to construe this bill of lading according to the principle of construction which was laid down in *Leduc* v. *Ward* (1), a decision which I not only think we are bound to follow, but which I think was right. We have to

(1) 20 Q. B. D. 475.
(2) 3 Taunt. 16.
(3) 2 M. & S. 27.
(4) 5 Taunt. 480.
(5) Park on Insurances (8th ed.) vol. ii. p. 626.

construe a well-known description of contract—a contract contained in a bill of lading. A bill of lading is a contract for the carriage of goods on board a ship, and the first thing which the shipper and the shipowner must agree upon is the voyage. As was said in *Leduc* v. *Ward* (1), the object of the shipper is to have his goods carried from one place to another, in order that when they reach the place of destination they may be either sold or used. The object of the shipowner is to carry the goods from the one place to the other; and upon the voyage on which he is to carry them depends the freight—that is the charge which he can properly make for carrying them. If he is to carry the goods 500 miles, he will charge one freight; if he is to carry them 2000 miles, it is absurd to suppose that he will not charge a great deal more.

Therefore, the first thing which is always settled between a shipowner and a shipper of goods is the voyage. And, after the hundreds of years during which bills of lading have existed, we know the mode in which the voyage is generally described—viz., as from "the port in which the ship is now lying," or at which the goods are to be shipped, to another port which is named. It is generally, but not always, from the port in which the ship is lying, because there may be a charterparty providing that the ship shall go to another port and there ship the goods. In such a case the whole charterparty voyage would include the port at which the goods were not to be shipped; but, when the bill of lading is given only after the goods are shipped, and when it would be improperly given before, the voyage must be from the port in which the ship is then lying to the port of destination, and that is the voyage described. In the present case, the words of the bill of lading are, "now lying in the port of Malaga, and bound for Liverpool." The voyage described is from Malaga to Liverpool, and, if there were nothing else in the bill of lading, the ship would be bound to go from Malaga to Liverpool, according to the ordinary sea course for a steamer from the former port to the latter, and she would not be entitled to stop or to call at any other port, although it was in that course; she would be bound to go straight. But here, after describing

(1) 20 Q. B. D. 475.

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the voyage, liberty is given to do something. What is that liberty? It is a liberty with regard to that voyage. It is not liberty to go another voyage, but liberty to do something with regard to that voyage which the ship could not do if the bill of lading had stopped at the words "from Malaga to Liverpool." But, when in a bill of lading liberty is given to the ship to call at any port, the Courts have said that they know enough of mercantile business to be sure that the meaning is, liberty to call at those ports which are on the course of the voyage, although not exactly the sea course which the ship would take. It means that she may go slightly out of that course; for otherwise she could not get to the port at which she may call. Then the Courts said that the meaning must be that the ship may call at those ports in their geographical order. This having been once held by the Courts, the shipowners insisted upon, and the merchants agreed to, the insertion of the words "to call in any order." Still, that did not get rid of the first limitation, that they must be ports on the geographical course. The present bill of lading goes further, and, having fixed the voyage, it adds, "with liberty to proceed and stay at any port or ports in any rotation." If it had stopped there, the meaning would be, any ports on the geographical voyage. But it goes on to say, "in the Mediterranean, the Levant, Black Sea, or Adriatic," &c. Is there a reasonable and fair construction which will not only give a meaning to those words, but will also give a meaning to the primary words which describe the voyage? When you are describing a voyage, and you add with regard to that voyage liberty to do something, would it be a reasonable construction to say, it means that you may go an absolutely different voyage? I think not. I think we must put a limitation on the words (not exactly the same), but analogous to that which has been put on similar words in other cases, and we must say that the meaning is, with liberty to proceed to and stay at those of the places named, which, as was said in *Leduc* v. *Ward* (1), are substantially on the course of the voyage named and agreed upon, and hold that the words do not enable the shipowners to go upon that which is in substance another and an absolutely different

(1) 20 Q. B. D. 475.

voyage. The voyage agreed on was from Malaga to Liverpool. The ship went straight away from the direct course to Liverpool; she went in the opposite direction to Burriana, and Mr. Bigham was obliged to admit that his argument, if well-founded, would equally allow the ship to go to Constantinople, then into the Black Sea to Sebastopol, and thence round the coast of Africa to Liverpool.

Can any reasonable being say that that would be a voyage from Malaga to Liverpool, or substantially in the course of that voyage, or anything but an absolutely different voyage? In my opinion, it would be an absolutely different voyage. It has been suggested that such a construction would render it difficult for shipowners to fill their vessels. To my mind, the shipowner's course is very plain. If he enters into a contract to ship oranges at Malaga for Liverpool at a time when his ship is not full, he ought, before he ships the oranges at Malaga, to make up his mind whether his ship is or is not going to the eastward to look for other cargo. If she is, he should not take the oranges on board at Malaga till the ship comes back again. The ship ought to go to her furthest port first when she is about to carry such perishable goods. The ship might have gone to Burriana or to Barcelona, and have taken goods on board there under such a bill of lading as this, if the voyage had been described as from Barcelona to Liverpool; then, with this liberty, she might have called at Malaga and taken the oranges on board. But in that case the oranges would not have been shut up in the ship's hold whilst she was going from Malaga to Burriana and back. If the shipowner chooses to ship oranges at Malaga, and then to go to Burriana and Barcelona and other places in that direction, he must describe the voyage, not as from Malaga to Liverpool, but as from Malaga to Burriana and Barcelona, and the other places at which he intends to call; and, if he does so, and the oranges are spoilt, the shipper may thank his own folly for putting them on board at Malaga, and he could not then say that he had not agreed to it. There are ways, therefore, in which the shipowner, if he wished to do what has been done in the present case, could describe clearly what he intended to do. But, if he described his voyage in that way, no man in his senses would put his oranges on board the

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ship at Malaga, and the shipowner would not obtain that freight. There is really no difficulty in the way of managing such a business, and I am perfectly clear that, according to the rule laid down in *Leduc* v. *Ward* (1), the true construction of this bill of lading is that which I have stated, and that it does not give liberty on a voyage from Malaga to Liverpool to go to places which, instead of being in any sense on the course of that voyage, really constitute another absolutely different and inconsistent voyage.

I think, therefore, that the ruling of the learned judge upon the construction of the bill of lading was right, and that the plaintiffs are entitled to recover.

BOWEN, L.J. I am of the same opinion. A perishable cargo of oranges was shipped at Malaga for Liverpool, under the contract to carry which was contained in the bill of lading. Instead of going direct from Malaga to Liverpool, the ship proceeded on the north-east Spanish coast to Burriana, a place some two days' steam from Malaga, and the consequence, as is admitted, was that the oranges were spoilt when they were delivered at Liverpool.

How does the shipowner seek to justify this delay? He seeks to justify it under the contract of carriage itself. We must, therefore, look at the provision in that contract which is put forward as justifying this proceeding. It is this. The ship is said to be at Malaga, bound for Liverpool, "with liberty to proceed to and stay at any port or ports, in any rotation, in the Mediterranean, Levant, Black Sea, Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purposes whatsoever." The shipowner says that such a clause gives him leave to go all round the world before he delivers this cargo in England, excluding only Asia and America and Australia. The question is, whether those general words can be construed as giving so large a license, or whether there is not a well-known principle of construction of bills of lading and contracts of carriage, under which they receive a colour and a limitation from the purposes of the contract of carriage as ascertained from that

(1) 20 Q. B. D. 475.

contract itself. I think it is clear how these general words came to be framed in this large way. The ships engaged in the Mediterranean trade generally coast from place to place, or may wish to do so, or to go what I may call a circular voyage, picking up cargo at various places, even when they are ultimately bound to a port outside the Straits of Gibraltar—to the coasts of France or Great Britain—and the printed form of bill of lading is framed in such a comprehensive way as to enable any ports to be touched at within the large ambit mentioned. But, so soon as the parties have agreed upon the voyage, and have written that in, the definition of the voyage must, as a matter of business, cut down the general words to what is fairly applicable to the voyage which has been agreed upon and defined. Any other construction would make business impossible. It would make it impossible to insure the cargo. It would make it impossible for the consignees of the cargo to know what to do as to taking delivery, or what to do with the bills of lading. It is impossible to suppose that the general words are not to receive a light and a limitation from the definition of the voyage which is the very object of the contract. It would be an outrage upon all legal principle to suppose that general words of this sort are to be read in their widest signification, although the object of the contract has been defined by words which limit it to a particular voyage.

If that is the principle, what authorities are there? *Leduc* v. *Ward* (1) proceeds upon that reasoning and adopts that principle, and we should be bound to follow the reasoning even if we did not agree with it, which I certainly do. The Courts have from time immemorial insisted upon putting a reasonable construction upon the general words of the shipowner who draws up these bills of lading and inserts clauses for his own benefit. In *Gairdner* v. *Senhouse* (2), Sir James Mansfield, C.J., invoked the same principle for the purpose of construing the general words in a policy of assurance. The real question is, what is the true construction of this bill of lading; and once more the Court, I think rightly and acting on sound commercial instincts, will insist upon limiting general words by the object of the contract as ascertained from the contract itself.

(1) 20 Q. B. D. 475. (2) 3 Taunt. 16.

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FRY, L.J. I am entirely of the same opinion. Our decision depends, as it appears to me, upon an ancient and well-established principle of construction, of which *Leduc* v. *Ward* (1) is one of the most recent illustrations. I think that principle of construction is not confined to this class of documents, but is applicable to all documents. This principle is applicable wherever specific words are used to express the main object and intent of the instrument, and in some other parts general words are used which in their utmost generality would be inconsistent with and destructive of the main object of the contract. When the Court in dealing with a contract or document of any kind finds that difficulty, it always, so far as I know, follows this principle, that the general words must be limited so that they shall be consistent with and shall not defeat the main object of the contracting parties. That well-established and ancient principle applies here, and, as it seems to me, the answer to the arguments of the appellants' counsel is exactly that which has been given by the Master of the Rolls and the Lord Justice. I agree entirely with their judgments.

Appeal dismissed.

Solicitors: *W. A. Crump & Son; Snow, Snow, & Fox.*

W. L. C.

1892 *Jan.* 20.

BRANNIGAN *v.* ROBINSON.

Employers' Liability Act, 1880 (43 & 44 *Vict.* c. 42), s. 1, *sub-s.* (1)—*Builder pulling down House—Fall of Wall—"Defect in the condition of the works."*

The defendant, a builder, was engaged in pulling down an old house. After the roof had been removed and part of the walls pulled down, he ordered the plaintiff, a labourer in his employment, to remove some of the débris of the roof which lay on the ground near one of the walls which was still left standing. While the plaintiff was carrying out that order the wall, owing to the neglect of the defendant to have it shored up, fell upon the plaintiff and injured him:—

Held, that the dangerous condition of the wall was a "defect in the condition of the works connected with or used in the business" of the defendant within the meaning of s. 1, sub-s. (1) of the Employers' Liability Act, 1880.

APPEAL from the county court for Lancashire.

The defendant, a builder, who had a contract for the building

(1) 20 Q. B. D. 475.

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of a theatre, was engaged in pulling down some old houses for the purpose of clearing the site. After the roof of one of the houses had been taken off, and the side walls pulled down, he directed the plaintiff, a labourer in his employment, to pick up some pieces of timber which had formed part of the roof, and which had fallen on to the ground immediately below a gable end which was still left standing. Whilst the plaintiff was engaged in picking up the timber the gable, owing to the defendant's neglect to shore or otherwise secure it, fell upon the plaintiff and injured him. The plaintiff sued the defendant in the county court under s. 1, sub-s. (1), of the Employers' Liability Act, 1880. The judge left it to the jury to say whether the injury was caused by reason of a defect in the condition of the ways, works, or plant connected with or used in the business of the defendant. The verdict was for the plaintiff for the sum of 171*l.* 12*s.* The defendant moved by way of appeal to enter judgment for him on the ground that there was no evidence of liability under the Act.

Loehnis, for the defendant. The judge was wrong in leaving the question to the jury. The dangerous condition of the wall was not a defect in the condition of any ways or works of the kind contemplated by s. 1, sub-s. (1). The ways or works there referred to mean the ways or works on the employer's own premises where he permanently carries on his business, such as the ways or works connected with a factory. Moreover, the word "works," as applied to a building, means a complete structure. It has been held that a building in process of erection is not "works" within the section: *Howe* v. *Finch.* (1) Equally must the term be inapplicable to a building in process of demolition.

C. A. Russell, for the plaintiff. The condition of the wall was a defect in the works. There is nothing in the Act to shew that the "works" must be on premises belonging to the employer, or that that term does not include incomplete structures. The works of a building contractor include the premises of which he takes temporary possession for the purpose of his building operations. If he has several different building operations going on in different places he has so many different works. If the

(1) 17 Q. B. D. 187.

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defendant is right a dock, railway, or canal in course of construction would not be works, but in common parlance they certainly would be so spoken of. In *Smith* v. *Baker & Sons* (1), where the action was against railway contractors for an injury sustained by one of their workmen employed in the making of a railway cutting, Lord Watson, at p. 354, said: "I see no reason to doubt that an arrangement of machinery and tackle, which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of the business, constitutes a defect in the condition of the works within the meaning of the sub-section." The case of *Howe* v. *Finch* (2) is not a decision on the meaning of the word "works," but on the latter words of the sub-section, "used in the business of the employer." There the action was brought, not against the builder, but against the owners of the premises for whom the building was being erected, and it was held that the building could not be said to be used in the defendants' business until it was complete and taken over from the building contractor.

Loehnis, in reply. If the plaintiff's contention is right, then, if a contractor were employed to cut down timber, the trees or the soil on which they stood would be the contractor's works. But that would be straining the language of the section to an absurd extent. It is not disputed that the defendant is liable at Common Law; but then the action could not be brought in the county court, the amount claimed and recovered being in excess of the county court jurisdiction.

LAWRANCE, J. I am of opinion that in this case the appeal must be dismissed. The county court judge was, in my judgment, quite right in leaving the matter to the jury, for I think that the danger arising from the wall being unshored was a defect in the condition of the works connected with or used in the defendant's business. The defendant was a builder, whose business it was to pull down walls as well as to build them up. The walls he deals with must be just as much works connected with his business in the one case as in the other. The passage cited from Lord Watson's judgment in *Smith* v. *Baker & Sons* (3) strongly supports the plaintiff's contention that the term

(1) [1891] A. C. 325. (2) 17 Q. B. D. 187. (3) [1891] A. C. at p. 354.

"works" in the s. 1, sub-s. (1), is sufficiently wide to include the wall in the present case.

WRIGHT, J. I am of the same opinion. At first I was inclined to agree with Mr. Loehnis' contention; but on reflection I have come to a different conclusion, though not without considerable hesitation and doubt. The plaintiff's employer in this case was a person who made it his business amongst other things to clear building sites, and for that purpose to pull down old houses where necessary. In the course of such business he had to deal with a wall which formed part of a house which he was engaged in pulling down. The wall was unsafe, and in order to prevent accidents he ought to have shored it up or secured it in some way. Owing to his neglect to secure it, it fell upon the plaintiff and injured him. The question is, whether under those circumstances the insecurity of the wall was not a defect in the condition of the works within the meaning of the Act. If we were to hold that it was not, I think we should be putting an unduly narrow interpretation upon the word "works," and should be excluding from the operation of the Act a large class of businesses which are not carried on upon any fixed site. I cannot see why premises which are in the possession of a person for the purposes of his business should not be regarded as the works of such person so long as he is carrying on his business there. The case of *Howe* v. *Finch* (1) is not in any way inconsistent with our judgment; for in that case the employer who was sued was not the builder, but the owner of the premises, and the wall, being still in an unfinished state and in the possession of the builder at the time of the accident, could not have been said to be connected with or used in the business of the employer.

Appeal dismissed.

Solicitors for plaintiff: *Busk & Co., for J. Bradbury, Ashton-under-Lyne.*

Solicitors for defendant: *Shaw, Tremellen & Co., for J. Whitworth, Ashton-under-Lyne.*

J. F. C.

(1) 17 Q. B. D. 187.

C. A.
1892
Jan. 11.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF FRANK GALLSWORTHY *v.* SELBY DAM DRAINAGE COMMISSIONERS.

Corporation—Rates—Statutory Corporation for Public Purposes—Limitation of Amount to be Expended—Damages for Negligence.

Where a local Act of Parliament incorporates commissioners for the execution of works, and confers on them rating powers for the purposes of the Act, the implication will be, unless the contrary clearly appear, that it is within their powers to levy a rate in order to provide for a liability arising through negligence in the execution of the works.

A drainage Act incorporated commissioners, who were to take over certain existing and to execute certain new drainage works within their district. By the 38th section of the Act it was provided that "the costs of and incident to the taking over, enlarging, altering, repairing, renewing, or cleansing, in the first instance, any existing drains and works incident to drainage purposes, the constructing such new works as may be necessary to effectually drain the land within the limits of the Act, and the payment of principal or interest, if any, on moneys borrowed for any of the above purposes, shall be borne by the owners of the lands rateably" in the manner specified; "provided that the total amount to be expended under the powers of this Act for the above purposes, save as to interest, shall not exceed the sum of 15,000*l.*" By s. 40 of the Act it was provided that in every year the commissioners should "have estimates prepared of all the moneys required to meet the claims for the ensuing year," and that "such estimates should shew in separate items the amount (if any) for constructing new works, the amount payable for principal and interest on money borrowed," and also "the cost of carrying out the objects of this Act." By s. 41, "to provide for so much of the expenses aforesaid as are properly chargeable out of the rates for the current year," the commissioners were given power to make rates annually on the owners of the lands within the limits of the Act:—

Held, that the limitation of the amount to be expended in s. 38 applied to the expenditure on and incident to the works themselves, not to liabilities to pay damages arising from negligence of the commissioners' servants in carrying out the works; and that the commissioners had power under ss. 40 and 41 to make rates for the purpose of meeting such liabilities, although their capital expenditure had already reached the amount mentioned in s. 38.

APPEAL from an order of the Queen's Bench Division (Mathew and A. L. Smith, JJ.) for the issue of a peremptory writ of mandamus, directing the defendants to make and levy a rate on the owners of land within their district to satisfy a judgment recovered against them by the prosecutor.

The facts appeared to be as follows:—

An action had been brought by the prosecutor against the defendants to recover damages for negligence in carrying out certain drainage works, through which premises of the prosecutor's had been injured by subsidence. The prosecutor ultimately obtained judgment in that action for 1626*l*. The commissioners had no goods available in execution and refused to make a rate to satisfy the judgment, on the ground that they had no power to do so.

The Selby Dam Drainage Act, 1885 (48 & 49 Vict. c. clxxxv.), after reciting a previous drainage Act, and that it was expedient to provide a better system of drainage for the lands drained under that Act and other lands adjoining thereto, incorporated a body of commissioners for putting the Act into execution, to be from time to time renewed by election by ratepayers under the Act, and provided for the holding of an annual general meeting of such ratepayers. By the Act the commissioners were empowered to use the existing drains, and from time to time to enlarge, widen, deepen, straighten, alter and improve, repair or maintain, any of the existing drains, sewers, &c., and to enlarge, rebuild, raise, widen, or otherwise improve or remove any of the existing cloughs, tunnels, dams, sluices, bridges, or other works, or to make any new drains, sewers, &c., or other works, in or through the lands within the limits of the Act, and delineated upon a deposited map or plan, which in their opinion might be necessary for the effectual drainage thereof. Sect. 21 provided for the appointment by the commissioners of a surveyor, who among other things was to define all the works and operations necessary to be commenced or undertaken in the first instance for the effectual drainage of all the lands within the limits of the Act, and that the commissioners should forthwith cause the said works to be commenced and executed within a period of five years from the passing of the Act. The 22nd section of the Act provided for an assessment by the surveyor of the rateable values of the lands included within the operation of the Act, having regard to the benefits they would severally receive, and that he should make an assessments award defining such values. By s. 29, it was provided that the commissioners

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might from time to time borrow at interest on mortgage of the rates, which they were thereafter authorized to make, such sum or sums of money as they might from time to time think necessary, not exceeding in the whole 15,000*l.* By s. 30, all sums borrowed by the commissioners in pursuance of the Act were to be repaid by them within a period not exceeding thirty years after the sums were respectively borrowed either by equal yearly or half-yearly instalments of principal, or of principal and interest combined, or by means of a sinking fund. By s. 37, it was provided that "the commissioners shall apply all moneys borrowed by them to the general purposes of the Act, provided always that all moneys borrowed by the commissioners under the authority of the Act shall be applied only to purposes to which capital is properly applicable, and such purposes shall be deemed to include the first cost of repairing, renewing, and cleansing the existing drainage works, but not of subsequent maintenance." Sect. 38 of the Act provided that "The costs of and incident to (1.) preparing, applying for, and obtaining this Act, (2.) the preparation of the map or plan, and assessments award, (3.) the taking over, enlarging, altering, repairing, renewing, or cleansing in the first instance, any existing drains and works incident to drainage purposes, (4.) constructing such new works as may be necessary to effectually drain the land within the limits of this Act, (5.) the repayment of principal and interest, if any, on moneys borrowed for any of the above purposes, shall be borne by the owners of the lands rateably in the proportions specified in the assessments award, provided that the total amount to be expended under the powers of this Act for the above purposes, save as to interest, shall not exceed the sum of 15,000*l.*, save that with the consent in writing of a majority in number representing three-fourths in value of the owners of the said lands a further sum not exceeding 2000*l.* over and above the said sum of 15,000*l.* may be expended on capital account, which further sum shall be raised by a rate of not exceeding one shilling per acre per annum, payable over a period not exceeding four years. The repayment of the said sum of 15,000*l.* or any part thereof expended upon the works authorized by this Act shall only be enforceable by means of

an annual rate to be levied for not less than thirty years from the date of the passing of this Act." The 39th section provided that, when the works referred to in s. 21 had been completed, the surveyor should give a certificate to that effect, and that thereupon the expense of maintaining, repairing, and cleansing such works in like condition, and of carrying out the several provisions of the Act, should be charged to and paid by the occupiers in the proportions specified in the assessments award. The 40th section of the Act provided that "Fourteen days at least before every annual general meeting the commissioners shall have estimates prepared of all the moneys required to meet the claims for the ensuing year. Such estimates shall shew in separate items the amount (if any) for constructing new works, the amount payable for principal and interest on money borrowed, and also the cost of maintaining, repairing, and cleansing the drainage works, and of carrying out the objects of this Act. And separate rates shall be made and separate accounts kept of the receipts and expenditure in respect of such charges and expenses as are payable by the owners, and such charges and expenses as are payable by the occupiers." Sect. 41 provided, that "To provide for so much of the expenses aforesaid as are properly chargeable out of the rates for the current year, the commissioners shall within one month after such annual general meeting make one rate for the owners and another for the occupiers of the said lands in accordance with such estimates, and all such rates shall be assessed according to the provisions of the said assessments award, and may be made or levied either retrospectively in order to raise money for the payment of the liabilities and expenses incurred at any time within six months before the making of the rate, or prospectively to provide for the current expenses of the ensuing year.

The damage had been occasioned to the prosecutor's premises through negligence in not properly shoring up the adjacent ground while the operation of deepening the Selby Dam, one of the existing works taken over by the defendants under the powers of the Act, was being carried out. This operation formed part of the works which had to be done previously to the certificate of completion given by the surveyor under s. 39. It appeared that the

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capital expenditure of the defendants on and incidental to the works had already reached the limit mentioned in s. 38 of the Act, and the defendants contended that under the circumstances they had no power to make a rate for the purpose of paying the damages due to the prosecutor. The prosecutor, therefore, applied to the Queen's Bench Division for a mandamus, which was granted.

E. Tindal Atkinson, Q.C., and *T. Willes Chitty*, for the defendants. The defendants have no power to make a rate as required by the mandamus. Commissioners such as the defendants are entirely the creatures of the Act under which they are appointed. They have no power to make rates other than that given them by the statute. The defendants' power to rate the owners under their statute is exhausted. The scheme of the local Act was that the total amount of the capital expenditure which the commissioners could charge upon the owners under their powers should be limited by s. 38 to the amount therein specified. A sum paid for damages recovered in respect of negligence in carrying out the works would be "costs incident to" the works within the meaning of that section. Sections 40 and 41 only provide machinery for charging upon the owners the expenditure for which they are liable under s. 38. Those sections do not enlarge the amount which can be charged upon the owners. The "purposes aforesaid" in s. 41 must be ascertained by reference to s. 38. The full amount specified in that section having already been expended, the commissioners have no power to make a rate on the owners to provide for the damages in question. If the commissioners do anything, or incur any liability, beyond their powers, the remedy is against them in their individual capacity; but there is no power to charge the owners beyond the amount authorized by the Act. There is no case in which it has been held that in such a case as this a rate may be made in order to pay damages in an action for negligence in the execution of the works. In *Southampton and Itchen Bridge Co.* v. *Southampton Local Board* (1), it was held that such an action would lie against a local board eo nomine; but it was

(1) 8 E. & B. 801.

not decided that the board could pay the damages recovered in such an action out of the rates.

[LORD ESHER, M.R. The observations of Wightman, J., in that case are very strong to shew that he thought that they could.]

[They also cited *Gibbs* v. *Mersey Docks Trustees.* (1)]

Forbes, Q.C., and *H. Tindal Atkinson*, (*H. F. Manisty*, with them), for the prosecutor, were not called upon.

LORD ESHER, M.R. The question in this case is whether the defendants are bound to make a rate in order to satisfy the judgment obtained against them by the prosecutor. The power to make rates is given by s. 41 of the Local Act, which enacts that the commissioners may make rates "to provide for so much of the 'expenses aforesaid' as are properly chargeable out of the rates for the current year." The language renders it necessary to refer back, in order to see what are the "expenses aforesaid." I think that appears from s. 40, which says that "fourteen days at least before every annual general meeting the commissioners shall have estimates prepared of all the moneys required to meet the claims for the ensuing year," and that "such estimates shall shew in separate items the amount, if any, for constructing new works, the amount payable for principal and interest on money borrowed, and also the cost of maintaining, repairing, and cleansing the drainage works, and of carrying out the objects of this Act." Then the section provides that separate rates shall be made and accounts kept in respect of the matters chargeable on the owners and those which are chargeable on the occupiers. Supposing that those two sections had to be construed without s. 38, what would be their proper construction? The question is, whether it is not a rule which has been laid down for the construction of such Acts as this, that, where commissioners are enabled to make rates in respect of works to be done by them through their servants, if such works be done negligently by their servants, they are not to be made personally liable, but the liability incurred may be made the subject-matter of a rate. It

(1) Law Rep. 1 H. L. 93.

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Lord Esher, M.R.

seems to me that the result of the cases of *Gibbs* v. *Mersey Docks Trustees* (1), and *Southampton and Itchen Bridge Co.* v. *Southampton Local Board* (2), really is, that, where commissioners have to construct works, and may levy rates to pay for their construction, there is an implication, unless it be clearly negatived by something in the Act to the contrary, that it is within their power to levy a rate to provide for a liability incurred through the work being done negligently by their servants. So, even without the words in the 40th section "and of carrying out the objects of this Act," I should have thought that such an implication would exist; but those words make the matter still clearer. Therefore, if ss. 40 and 41 had stood alone, I should have thought that, if new works were negligently done without personal default on the part of the commissioners, they could make a rate to cover the damages payable in respect of such negligence, as well as the actual cost of constructing the works. Then we have to see whether that which would primâ facie be the construction of these sections is clearly limited by something contained in another part of the Act. It is said that s. 38 has this effect. It seems to me that, where injury is done to persons who may have no power over the commissioners, no voice in their election, and no interest in the works they are carrying out, except that they shall be carried out so as not to cause injury to themselves, and it is intended that there shall be a limitation of the rights of such persons, such a limitation ought to be clearly expressed, and any enactment that is vouched as effecting such a limitation ought to be strictly construed. Therefore, I think the proviso to s. 38 must be strictly construed. Section 38 states that certain costs are to be payable by the owners, and then follows a proviso, "that the total amount to be expended under this Act for the above purposes, save as to interest, shall not exceed the sum of 15,000*l*." The question is, whether the words "to be expended, &c.," include payment of damages such as those in question. Payment of damages is not expenditure "for the above purposes." There is no such purpose above stated. The expenditure referred to is for the doing of the works mentioned; it does not cover damages payable to persons

(1) Law Rep. 1 H. L. 93. (2) 8 E. & B. 801.

injured by negligence in the doing of them. The amount of such damages is not an amount to be expended "for the above purposes" under s. 38, and it is part of the "cost of carrying out the objects of this Act" within s. 40. Therefore, I am of opinion that s. 38 does not limit or affect what would primâ facie be the construction of ss. 40 and 41 in reference to this case. For these reasons, I agree with the judgment of the Divisional Court, and think that the appeal must be dismissed.

FRY, L.J. I am of the same opinion. By this Act a body of commissioners was constituted to carry into effect certain works. At the time when the Act was passed, it was established law that commissioners of this description might be responsible for negligence in the doing of the work which by their Act they were authorized to do. The general scheme of the Act is this. The commissioners are to do certain new drainage works and to maintain the works. The works are to be done at the expense of the owners of land in the area to which the Act applies; they are to be maintained at the expense of the occupiers in such area. The commissioners are to have power to borrow to the extent of 15,000*l.*, the amount borrowed being repayable by instalments covering a period of thirty years. The whole of the costs of and incidental to the new works are by s. 38 to be borne by the owners, and the same section contains a proviso that the total amount to be expended "for the above purposes," i.e., for the purpose of doing the works, shall not exceed 15,000*l.*, except that, with the consent in writing of a majority in number representing three-fourths in value of the owners, a further sum of 2000*l.* may be expended on capital account.

The language of the proviso deals, as it appears to me, with expenditure on the works, not with liability by reason of negligence. Money which is recovered from the commissioners in respect of negligence is not a sum expended on the works; it is a liability incurred in carrying the Act into execution. The proviso deals with expenditure only, not with such a liability. We are asked to read the proviso as saying that the total of the amount to be expended and liability to be incurred shall not exceed 15,000*l.* These are not the words of the Act, nor is it likely that such a

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limitation would be found in an Act of this kind. It is impossible to make any estimate beforehand in respect of such a liability; the legislature would not anticipate that such a liability would necessarily arise, and it might never arise. Therefore, it is not likely that the statute would enact, and in point of fact it does not enact, what the defendants suggest. I come now to s. 40. That section provides for annual estimates of "all the moneys required to meet the claims for the ensuing year." The amount of these damages is a claim established by the judgment of a Court of law, and therefore primâ facie ought to be included in the estimates for the year. The section proceeds: "such estimates shall shew in separate items the amount, if any, for constructing new works, the amount payable for principal and interest on money borrowed, and also the cost of maintaining, repairing, and cleansing the drainage works," and, be it observed, "of carrying out the objects of this Act." These latter words are as wide as they can be for the purpose of bringing into the estimate every expenditure or liability that could be made or incurred by the commissioners acting under the Act. In my opinion, they include a liability for negligence such as that now in question. Then the section provides that separate rates shall be made and separate accounts kept in respect of the matters chargeable on owners and those chargeable on occupiers respectively. We are asked to hold that the 40th section refers back to the 38th, and only provides for the expenditure mentioned in that section. But the 40th section does not refer in terms to the 38th section at all. It refers in general terms to the classes of expenditure mentioned in the section itself, and then provides, according to the justice of the case, what is to be capital expenditure chargeable on owners and what are to be annual charges on occupiers. It is incredible, to my mind, that, if it had been intended that the limit of 15,000*l.* should apply to all the capital expenses included in this section, there should not have been some express reference to that limit in the section. Then the 41st section authorizes the commissioners to make separate rates on owners and occupiers respectively to provide for so much of the "expenses aforesaid," that is to say, the expenses mentioned in the previous section, as are properly chargeable on such rates. It appears to me that

the scheme of the Act is perfectly clear, and that the Court below were right in their construction of its language.

Appeal dismissed.

Solicitors for prosecutor: *Torr & Co., for Simpsons & Denham.*
Solicitors for defendants: *Ridsdale & Son, for Weddall, Parker, & Parker.*

E. L.

SWANSEA IMPROVEMENTS AND TRAMWAY COMPANY *v.* SWANSEA URBAN SANITARY AUTHORITY.

1892
Jan. 25, 26.

Local Government Acts—General District Rate—"Land used only as a Railway"—Tramway—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (*b*), "the occupier of any land . . . used only as a canal . . . or as a railway, constructed under the powers of any Act of Parliament, for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof."

The appellants, under the powers given them by certain local Acts of Parliament, constructed a tramway communicating by points and switches with a railway in their possession, which was worked by them in conjunction with the tramway, and which had been constructed under an Act of Parliament:—

Held, that the land occupied by the tramway was not "used only as a railway" within the meaning of the Act, and that the appellants were not entitled to be rated in respect of it in the proportion of one-fourth part only of its net annual value.

SPECIAL CASE stated by the court of quarter sessions for Glamorganshire, under 12 & 13 Vict. c. 45, s. 11, upon an appeal by the Swansea Improvements and Tramway Company against an assessment for a general district rate made by the respondents, the Swansea Urban Sanitary Authority. It appeared that the appellants occupied and worked a railway or tram-road known as the Oystermouth Railway (which was constructed under the powers of 44 Geo. 3, c. lv.), and also certain tramways constructed under the powers of certain local Acts of Parliament within the respondents' district.

On October 17, 1888, the respondents made a rate upon the appellants, under s. 210 of the Public Health Act, 1875, of two shillings in the pound on the full net annual value of all

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their property within the district, including the railway and tramways.

The appellants appealed against the rate in so far as it was assessed on the railway and tramways on the ground that the railway and tramways came within the exception in s. 211, sub-s. 1 (*b*), and that they were therefore entitled to be assessed in respect of them in the proportion of one-fourth part only of their net annual value. (1)

It was admitted that the Oystermouth Railway came within the section, and the only question was as to the rating of the system of tramways belonging to the appellants. These tramways ran through the streets of Swansea, and consisted of iron rails similar to the rails used in ordinary tramways, and were required to be kept on a level with the streets in which they were laid. The appellants were empowered to use and had used steam power on their tramways, and they occasionally had carried parcels for payment and had taken goods-waggons along part of their system, which was connected by points and switches with the Oystermouth Railway. The Oystermouth Railway communicated by points and otherwise with the Great Western, the London and North Western, and the Swansea Docks Railways, and loaded trucks had upon occasion been run from the docks at Swansea over the Oystermouth Railway on to the appellants' tramways. Through traffic was run over the Oystermouth Railway and the appellants' tramways.

The appellants were liable to and did in fact keep in repair the parts of the roadway on which their rails were laid; but the roadways themselves were the property of the corporation of Swansea.

The quarter sessions held that the land occupied by the tramways was not "land used only as a railway" within the meaning of the section, and confirmed the assessment.

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, "With respect to the assessment and levying of general district rates under this Act, the following provisions shall have effect (namely) . . . sub-s. 1 (*b*): The occupier of any land covered with water or used only as a canal or towing-path for the same or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

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Sir R. E. Webster, Q.C., A.G., and *Edward Boyle*, for the appellants. These tramways are "used as a railway" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, and should be rated at one-fourth part only of their net annual value. The sessions have decided that the land occupied by the tramways is not used "only" as a railway. That is going beyond the section, which grants the exemption to all land "used as a railway." The mere fact that this is called a tramway and not a railway will not deprive it of the benefit of the Act. By the Swansea Tramways Act, 1874 (37 & 38 Vict. c. cxxxviii.), under which these tramways were made, the acquisition and use of the Oystermouth Railway by the appellants was permitted (ss. 95, 96), and by s. 67 they were authorized to form junctions with it. The railway and tramways are, therefore, one system, and through traffic is in fact run over them. It was decided on a similar section in the Local Government Act, 1858 (21 & 22 Vict. c. 98, s. 55), that a private railway not constructed to carry passengers was within the exemption: *Reg.* v. *Newport Dock Co.* (1) [They also cited *South Wales Ry. Co.* v. *Local Board of Swansea.* (2)]

David Lewis, (*Finlay, Q.C.*, with him), for the respondents. The decision of the quarter sessions is right. The land occupied by these tramways is not "used as a railway." Tramways were perfectly well recognised in 1875 when the Public Health Act was passed, and they might have been exempted by name if it had been intended to do so. They must be taken to have been deliberately excluded by the legislature. It is easy to see why railways are exempted. They take little benefit from the rates; but tramways which pass through the streets share in the benefits of lighting, draining, and police protection of the streets, and these are paid for out of the rates. In *Reg.* v. *Newport Dock Co.* (1), it was a railway and not a tramway that was exempted. The legislature clearly understood the difference between railways and tramways: see 29 & 30 Vict. c. 108, s. 2; 31 & 32 Vict. c. 18, s. 2; 38 & 39 Vict. c. 55, s. 147.

The Attorney-General, in reply. No argument can be based on the fact that tramways, though well known, are not specially exempted by the Act. Docks were also well known in 1875, and

(1) 31 L. J. (M.C.) 266. (2) 4 E. & B. 189.

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yet it has been held that they come within the exemption of "land covered with water:" *Reg.* v. *Newport Dock Co.* (1)

Cur. adv. vult.

Jan. 27. WILLS, J. In this case the question is whether tramways for the purpose of rating under the Public Health Act fall under the exemption or partial exemption which is provided in the case of railways.

The question arises on the first sub-s. of the 211th section of the Public Health Act, 1875, the material words of which are, "any land covered with water or used only as a canal or towing-path for the same or as a railway." Such land is to be rated at one-fourth of its value. It was argued that the word "only" does not apply to land used as a railway. I can see no reason why it should not. The natural grammatical construction of the words would make it so applicable, and if in the second member of the phrase it was intended to omit that word, the natural way of expressing it would have been to have said "used only as a canal," &c., "or used as a railway." "Used only as" in the one branch of the sentence and followed by "or as" in the other, seems to imply that the word "only" covers them both. It appears to me, however, to be perfectly immaterial for the purposes of this case and the question we have now to decide, because the objection which has been taken on the part of the Urban Sanitary Authority, and which, in my opinion, is a good one, is that tramways are something essentially different from railways, and that in the legislation of 1875 where railways are spoken of they cannot possibly be supposed to include tramways. By that time tramways were so completely a part of the ordinary communication made use of in this country, that in 1870 a Tramways Act had been passed consolidating the provisions which in all ordinary cases for the future were to apply to tramways. The legislature when it passed that Act did not think it necessary to define a tramway, and, as definition is always "periculosæ plenum opus aleæ," I shall follow the example of legislature and not attempt to define either railway or tramway. It appears sufficient to say that no ordinary person

(1) 31 L. J. (M.C.) 266.

has any difficulty in distinguishing between the two. It seems to me, therefore, that the exemption in favour of railways cannot have been intended in the Act of 1875 to cover tramways.

But then it was argued that there were some special circumstances in the legislation with regard to the Swansea tramways which put this particular case beyond such general considerations.

In 1804 an Act of Parliament was passed authorizing the making of "a railway or tram-road" to Oystermouth. Afterwards a number of other local Acts were passed by which the present tramways company got power to lay down a considerable number of tramways in Swansea, and also to become the owners for the time being of the Oystermouth "railway or tram-road."

The present question arises not with regard to the Oystermouth Railway, but with regard to the tramways proper which have been made under the provisions of these Acts. The 67th section of the Act of 1874 (37 & 38 Vict. c. cxxxviii.), and a group of sections beginning with s. 80, seem to me to shew conclusively that these are the ordinary tramways which are laid down along the streets of a great town, and that they are indistinguishable from tramways as ordinarily understood. Parts 2 and 3 of the Tramways Act of 1870 are specifically incorporated by the Act of 1874. Further, to take away all doubt from the question of there being any exceptional circumstances in the fact that this tramway company now owns the Oystermouth Railway, it is provided by s. 97, sub-s. 4, of the Act, that "that railway or tram-road"—that is, the Oystermouth Railway—"shall for all purposes of tolls, rates, and charges, and all other purposes, be part of the tramway undertaking." So that there is nothing in that section, nor, as it seems to me, in any other part of the Act, which constitutes these tramways anything but ordinary tramways as that term is generally understood. It was pointed out in the course of the argument that the distinction between tramways and railways has been recognised both in s. 147 of the Public Health Act, 1875, and in several other Acts.

I might add, that it has never yet been contended, and certainly I am personally interested that it should not be contended, that tramways are subject to the jurisdiction of the Court over

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which I have the honour to preside, namely, the Railway and Canal Commission.

For these reasons, I am of opinion that this appeal should be dismissed with costs.

HAWKINS, J. I have nothing to add to the judgment of my brother Wills, but to say that it is to be considered as our joint judgment.

Appeal dismissed.

Solicitors for appellants: *Arnold Williams & Co.*

Solicitors for respondents: *Sharpe, Parker, Pritchard, & Sharpe, for John Thomas, Swansea.*

A. P. P. K.

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Dec. 12.

[IN THE COURT OF APPEAL.]

WHIFFEN AND ANOTHER, APPELLANTS; THE LICENSING JUSTICES OF MALLING, RESPONDENTS.

Licensing Acts—Inn—Licence—Renewal—Notice to attend at adjourned Meeting—Notice not purporting to be by Direction of Justices—Waiver of Irregularity by Appearance—Appeal to Quarter Sessions—Rehearing—Wine and Beerhouse Act, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42.

At an annual licensing meeting an objection was raised to the renewal of the licence of the appellant, the tenant of a beerhouse licensed prior to May 1, 1869, and the justices directed that notice of objection should be given to him, under s. 42 of the Licensing Act, 1872, and adjourned the meeting. This notice was given by the superintendent of police, and did not express on the face of it that it was given by direction of the justices. The grounds stated in the notice were that persons had been found drunk and disorderly on the premises, and that persons of bad character frequented the premises. The appellant attended at the adjourned meeting, and the justices refused to renew the licence on the ground that he had not produced satisfactory evidence of good character. On appeal to quarter sessions the Court refused to renew the licence on the ground that the house was frequented by bad characters. On a case stated:—

Held (affirming the judgment of the Queen's Bench Division), that the absence of intimation that the notice was given by direction of the justices was an irregularity which was waived by the appearance of the appellant; and that, the appeal to quarter sessions being in the nature of a rehearing, that court could entertain and decide the case on any objection raised by the notice.

APPEAL from the judgment of the Queen's Bench Division on a special case stated by the court of quarter sessions for the county of Kent on appeal from the licensing justices of Malling.

1. The appellant, Walter Whiffen, was the tenant of a licensed beerhouse situate in the parish of Wrotham called the Gladstone Arms, and had been tenant thereof since February, 1889, and the appellant, John Samuel Bligh, was the owner of the house, which was licensed as a beerhouse prior to May 1, 1869.

2. On June 9, 1890, Walter Whiffen was summoned before the justices for permitting drunkenness in the Gladstone Arms on May 26, 1890, and the charge against him was dismissed, the chairman, however, observing that the case of this house was one which might properly be brought to the recollection of the Bench at the annual licensing sessions.

3. August 25, 1890, was the day for the annual licensing meeting for the division of Upper South Aylesford, in which division the Gladstone Arms was situate. Prior to August 25, 1890, no notice of objection to the renewal of the licence for the house had been served on the appellant Whiffen, and he did not attend the meeting of the justices.

4. At the meeting no objection was made by the police to the renewal of the licence; but the justices, on an objection being made by the justices of the peace, directed the superintendent of police to serve on the appellant Walter Whiffen a notice of objection to the renewal of the licence. (1)

5. Pursuant to this direction, the superintendent of police, on September 12, 1890, served on Walter Whiffen the following notice:—

"I, Richard Hulse, Superintendent of Police of the Malling

(1) The Licensing Act, 1872, s. 42, enacts: "Where a licensed person applies for the renewal of his licence the following provisions shall have effect: (1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend: (2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given. . ."

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Police District, in the county of Kent, do hereby give you notice that it is my intention to appear by myself, counsel, or attorney, at the adjourned licensing meeting to be held for the division of Upper South Aylesford, in the said county of Kent, at West Malling, on Monday, September 22, 1890, and oppose the renewal of the licence which you now hold for the sale of intoxicating liquors by retail at the premises now occupied by you at Wrotham in the said licensing district on the following grounds—(1.) That persons have been found drunk and disorderly and others under the influence of drink on several occasions upon your licensed premises; (2.) That persons of bad character do frequent your licensed premises."

6. Walter Whiffen attended before the justices at the adjourned general licensing meeting which was held on September 22, 1890.

7. The superintendent of police, pursuant to the directions of the justices, opposed the renewal of the licence to Walter Whiffen, and called in support of such opposition two police officers, who stated that Walter Whiffen had been summoned for permitting drunkenness on his premises on May 26, 1890, that such summons had been dismissed, but that on other occasions prior to May 26, 1890, they had seen at the public-house low characters, well-known poachers, and persons who had been convicted of drunkenness, theft, and poaching.

8. Walter Whiffen was not asked to and did not produce any evidence of good character before the justices.

9. The justices refused to renew the licence to the appellant Whiffen, stating the ground to be that he had not produced satisfactory evidence of good character, and said that, as they heard that the house was not required, they refused to transfer the licence to any other tenant.

10. Walter Whiffen and John Samuel Bligh gave notice of appeal to quarter sessions.

11. The appeal duly came on to be heard at the Michaelmas Quarter Sessions for the county of Kent, holden at Maidstone, on October 17, 1890.

12. On behalf of the appellants, it was contended that the justices at the annual licensing meeting had no power to refuse

the licence except upon one of the four grounds set out in s. 8 of the Wine and Beerhouse Act, 1869, and that the ground on which the justices so refused must have been specified in the notice of objection served on the licensed holder, pursuant to s. 26 of 37 & 38 Vict. c. 49; that in the present case no objection under sub-s. 1 of s. 8 of the Wine and Beerhouse Act, 1869, was specified in the notice; that the notice was defective and not binding on the appellants; that the justices not having decided on one of the grounds specified in the notice of September 12, 1890, and being one of those set out in s. 8 of the Wine and Beerhouse Act, 1869, were bound to renew the licence; that the justices at the general annual licensing meeting having refused to renew the licence on grounds not specified in s. 8, and in the notice of Sept. 12, 1890, the court of quarter sessions were bound to renew the licence.

13. The court of quarter sessions held, that even if the justices had wrongly refused to renew the licence that the court of quarter sessions had jurisdiction to re-hear the case and were not bound to renew the licence, and directed the appellants to proceed with their case.

14. The appellants put in and proved the shorthand notes of the hearing before the justices at the annual and adjourned licensing meetings, and also called witnesses to prove that Walter Whiffen was a person of good character and fit to conduct the house, and produced testimonials of good character.

15. On behalf of the respondent justices, the same police witnesses were called as had been called before the adjourned annual licensing meeting, and these proved that people of bad character and convicted of felony, night-poaching, drunkenness, shooting and wounding a gamekeeper, frequently were seen on the licensed premises.

16. The Court refused to renew the licence, and dismissed the appeal with costs, on the ground that the house was frequented by persons of bad character; with regard to which due notice was given that objection would be taken on the application for the renewal of the licence.

The questions for the Court were:—

1. Whether, having regard to the form of the notice of objection

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served on the appellant, Walter Whiffen, the justices at the adjourned annual licensing meeting acted ultrà vires in refusing to renew the licence on the ground of want of sufficient evidence of good character; and whether, if so, the court of quarter sessions had power to consider evidence against the appellant, or were (pursuant to the Licensing Acts, 1872 and 1874, and the Wine and Beerhouse Act, 1869) bound to grant the renewal of the licence to the appellant.

2. Whether the justices of the peace at the licensing meeting having refused to renew the licence on the ground mentioned in sub-s. 1 of s. 8 of the Wine and Beerhouse Act, 1869, it was competent to the quarter sessions to refuse to renew the licence on one of the grounds mentioned in sub-s. 2 of the section.

The case came before the Divisional Court (Cave and Charles, JJ.), and judgment was given for the respondents, on the ground that, the appeal to the quarter sessions being in the nature of a rehearing, that Court had a right to hear evidence as to and decide on any objection raised by the notice.

The appellants appealed.

J. Paterson, and *Morton Smith*, in support of the appeal. The notice to attend was not in accordance with s. 42 of the Licensing Act, 1872, for it was not given by or on account of the licensing justices, as required by the proviso. It was given by a third party, and was a nullity. This goes to the root of the jurisdiction of the licensing justices, and the appearance of the appellant was no waiver: *Reg.* v. *Farquhar* (1); *Reg.* v. *Merthyr Tydvil.* (2) The decision of the licensing justices was wrong, for they decided on a ground not raised by the notice: *Reg.* v. *Eales* (3); *Ruddick* v. *Justices of Liverpool.* (4) All that the court of quarter sessions could do was to consider the objections raised and dealt with before the licensing justices; and when they found that those justices had decided on a point not raised by the notice, the only course open to the justices in quarter sessions was to allow the appeal. [They cited also *Reg.* v. *Pilgrim.* (5)]

Dering, (*H. Russell*, with him), contrà, was stopped.

(1) Law Rep. 9 Q. B. 258.
(2) 14 Q. B. D. 584.
(3) 42 L. T. (N.S.) 735.
(4) 42 J. P. 406.
(5) Law Rep. 6 Q. B. 89.

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LORD ESHER, M.R. In this case the appellant, a beerhouse keeper, applied at the general annual licensing meeting for a renewal of his licence. The case being called on, and an objection taken, the justices adjourned the matter, and directed that notice should be given to the appellant of the objection to the renewal of his licence. The superintendent of police served on the appellant a notice in which he stated the date of the adjourned meeting and his intention to oppose the renewal of the licence upon certain grounds. The appellant attended at the adjourned sessions, and took part in the proceedings. The justices came to a conclusion not to renew the licence, the ground of their decision being that the appellant had failed to produce evidence of good character. Before they came to that conclusion, evidence had been given that people of bad character were frequently in the house; but there was no other evidence which had any bearing on the character of the appellant. It is said the justices had no jurisdiction in the matter, on the ground that no notice had been given to the appellant to which he was bound to pay any attention. The notice was given by the superintendent of police, and does not state that it was given by direction of the justices, and it was not given under their hands or by their clerk. I think, and should so hold, that the appellant might have treated this as no notice, there being nothing to shew that it was given by direction of the justices. But then arises the question whether he did not waive the irregularity. It is a notice that a tribunal which has jurisdiction is going to entertain the matter. It is not in the right form; but, on the other hand, it is not given by a person who had no power to do so, for if it had said in the notice that it was given by direction of the justices, who had, in fact, given such a direction, it would have been valid. The notice is thus wrong in form; but the irregularity was waived by the appearance of the appellant. Then it is said that compliance with s. 42 of the Act of 1872 is a condition precedent to the jurisdiction under that section. If the first part of the section stood alone, it would be an absolute enactment that an objection could not be entertained if the notice was not served in proper time. The proviso which follows gives the justices power, notwithstanding no notice has been given, on an objection being

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taken, to require the appearance of the holder of the licence at an adjourned meeting. That gave them power in the present case to require the attendance of the appellant; and the irregularity in carrying this out was cured by his appearance.

The justices had a right, when the appellant appeared, to consider the question before them, which was whether they would renew the licence; but they could only properly entertain the objections taken, and those objections must be some or all of those which are given in s. 8 of the Act of 1869. The objections there enumerated are quite distinct from one another, and are in different sub-sections. The justices, therefore, had no right to consider the question of the character of the appellant, which was not raised by the notice. Then the question came before the court of quarter sessions, and I agree with the Court below that the matter of appeal was whether the justices ought to have renewed the licence. Such an appeal to quarter sessions amounts to a rehearing and not to a simple appeal, and the court of quarter sessions had a right to hear fresh evidence, though they would be confined to the same objections of which notice was given originally. It is said that, notwithstanding the appeal being a rehearing, the court of quarter sessions were confined to the consideration of the objection upon which the justices at the licensing sessions based their decision, and the argument goes to this length, that although there may be two objections before the justices, and evidence given on both, yet if the decision was based on one only of such objections, the court of quarter sessions would be confined to that one, and could not consider the other. I cannot think that is the right view of the law; and I am, therefore, of opinion, that although the justices went wrong, the grounds on which they might have acted were brought by the appeal before the court of quarter sessions, and that Court had a right to go into the question and decide on these grounds. I am in entire agreement with the judgment and the reasons given by the learned judges of the Divisional Court and this appeal must be dismissed.

LOPES, L.J. I agree that the decision appealed against was right. It is said that the licensing justices had no jurisdic-

tion, and the case is put on two grounds: first, that the notice was bad; and secondly, that the decision was on a ground not mentioned in the notice. As to the first point, no notice had been given under the first part of the 2nd sub-section of s. 42 of the Act of 1872, and the applicant accordingly did not attend. One of the justices raised an objection, and thereupon the proviso to that sub-section came into play. It appears to me that the justices exactly complied with that proviso: they adjourned the hearing and directed the superintendent of police to give notice to the applicant. The notice that was given in accordance with this direction is said to be bad because it does not appear on the face of it to be given by direction of the justices. I think that probably the notice is informal in that respect; but the applicant appeared, and the case was conducted in due course and without any objection to the notice, and assuming that there was an informality it was waived by this appearance. Then it is said the justices exceeded their jurisdiction because they refused the renewal for a reason not stated in the notice as a ground of objection. It appears to me that they had no power to do this, and that if there were nothing more in the case the appellant would be entitled to succeed.

But then there was an appeal to quarter sessions, and that Court seems to have disregarded the point as to character on which the justices decided, probably because no notice of objection had been given on that ground, and to have proceeded on the second ground raised by the notice of objection, and held that that was established. It is said that that Court had no power to entertain that question because it was not the objection on which the licensing justices decided, and that all they could do was to determine whether the licensing justices had come to a right conclusion on the point on which they decided. It appears to me this is an altogether erroneous view. The appeal to quarter sessions is a rehearing, and the Court can hear fresh evidence, and were entitled to entertain any objection which the licensing justices could have entertained. The ground of objection that they decided on was one of those raised by the notice, and the view of the Divisional Court was entirely correct that the appeal to the quarter sessions is a rehearing on which

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any objection of which the appellant received due notice could be adjudicated on.

KAY, L.J. I also agree that the notice given to the appellant cannot be treated as a nullity—at most it was irregular in form. It was in fact given by the direction of the justices, though it is not so stated on the face of it. Had this been stated, it seems to be admitted that it would have been valid, and this shews that it was only irregular and not invalid. Recent cases dealing with the service of writs have pointed out the distinction that where what is assumed to be done is a nullity there is nothing that can be waived, but where there is an irregularity it can be waived: *Boyle* v. *Sacker* (1); *Fry* v. *Moore*. (2) The person on whom the notice was served might have treated it as irregular; but he appeared, and his appearance waived the objection.

On the second point, it seems to me clear that the court of quarter sessions was at liberty to rehear the case as distinguished from a mere appeal. The licensing justices found against the appellant on a ground which probably was not open to them; but there was another ground before them on which evidence was given, and it is now said that the court of quarter sessions cannot proceed to consider the case on that ground. That contention cannot be supported. There is certainly no hardship in the general rule that the court of quarter sessions rehear the case as if it were being brought before them originally, for the appellant must have been prepared to meet the points raised by the notice, and must be taken to have known that it was open to the court of quarter sessions to entertain any objection raised by the notice. I agree, therefore, that the appeal must be dismissed.

LORD ESHER, M.R. I may add that we are of opinion that the notice would have been good if it had stated that it was given by the superintendent of police "by direction of the justices sitting at the general annual licensing meeting," giving the date, or if it had been given by the clerk to the justices with a similar statement. This latter course would perhaps have been more regular; but we by no means treat the superintendent

(1) 39 Ch. D. 249. (2) 23 Q. B. D. 395.

of police as a mere intruder, for we have assumed that in fact he was acting by direction of the magistrates.

Appeal dismissed.

Solicitors for appellant: *Godden, Holme & Co., for Palmer & Wardley, Tonbridge.*

Solicitors for respondents: *Kayes & Jones, for H. W. Wilde, West Malling.*

A. M.

[IN THE COURT OF APPEAL.]

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THE QUEEN *v.* MARSHAM.

Metropolis—Management Acts—Paving of New Street—Apportionment of Expenses—Conclusiveness of Apportionment—Summons against Owner to enforce payment—Jurisdiction—Mandamus—18 & 19 *Vict. c.* 120, *ss.* 105, 225, 226; 25 & 26 *Vict. c.* 102, *s.* 77.

The apportionment by a district board of works under s. 77 of the Metropolis Management Act, 1862, of the expenses incurred by the board under s. 105 of the Metropolis Management Act, 1855, in paving a new street is not binding and conclusive for all purposes, and upon the hearing of a summons against an owner of property in the street to enforce payment of his apportioned share of such expenses, evidence may be given by him to shew that the amount alleged to have been expended has not been actually expended, or that it includes expenses other than paving expenses. The refusal by a magistrate to receive such evidence is not merely an improper rejection of evidence, but amounts to a refusal by him to exercise jurisdiction over a distinct branch of the inquiry, for which a mandamus to hear and determine the matter of the complaint is the appropriate remedy.

ORDER nisi for a writ of mandamus to a metropolitan police magistrate commanding him to hear and determine a complaint preferred by the Lewisham District Board of Works against the New Land Development Association, Limited, for refusing to pay the apportioned part of the expenses of paving a new street.

The facts were shortly as follows:—

The Lewisham District Board of Works, having determined that a new street within their district called Adelaide Road should be paved and formed, and that the expense should be charged upon and apportioned between the owners of the houses and land bounding or abutting thereon, proceeded to obtain an

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estimate of the expense, the total of which amounted to 916*l.* 13*s.*, and to apportion that amount amongst the adjoining owners. The amount apportioned to the Land Development Association in respect of property of which they were owners was 67*l.* 13*s.* After the work was carried out it was found that the actual expenses only amounted to 737*l.* 9*s.* 3*d.*, and the apportioned part chargeable to the Land Development Association was, therefore, only 54*l.* 8*s.* 6*d.* The sum of 29*l.* 18*s.* 6*d.* had already been paid on account of the estimated expenses, which left 24*l.* 10*s.*, due from the association to the board. The association having declined to pay the amount, a summons was issued against them under s. 77 of the Metropolis Management Act, 1862, the material part of which summons, after reciting the resolutions of the board, was as follows:—

"And that the sum of 67*l.* 13*s.*, being the apportionment of the estimated expense of 916*l.* 13*s.*, of so paving and forming such new street made by the said board of works in respect of the premises so chargeable, of which you are the owner, and such new street having been duly paved and formed in pursuance of such resolutions, and the expense of paving and forming such new street having been ascertained to amount to 737*l.* 9*s.* 3*d.* only, whereby the apportioned charge upon the said premises was reduced to 54*l.* 8*s.* 6*d.*, and the sum of 29*l.* 18*s.* 6*d.*, having been paid on account of the said estimated expense and no more, thereby leaving the sum of 24*l.* 10*s.* still due and payable to the said board, and the board having given you notice thereof, you . . . . did unlawfully neglect or refuse to pay the last-mentioned sum to the said board of works, contrary, &c."

At the hearing of the summons before the magistrate, the board failed to prove the ownership by the applicants of certain of the houses in respect of which they were alleged to be chargeable, and the claim became thereby reduced to 6*l.* 16*s.* 6*d.*

The clerk to the board having been called to prove the execution of the works and the amount of the apportionment, the applicants desired to cross-examine him as to whether the whole sum expended was paving expenses under the Act, or whether other than paving expenses had been included therein. The board objected that the apportionment of their surveyor could

not be questioned before the magistrate, but was final and conclusive; and the magistrate, being of opinion that this contention was correct, refused to allow the clerk of the board to be cross-examined or substantive evidence to be given by the applicants upon the point, and made an order for the payment of 6*l.* 16*s.* 6*d.* (1) An ex parte application by the Land Development Association for an order nisi for a mandamus was refused by a Divisional Court, but was subsequently granted by the Court of Appeal. (2)

(1) It was stated in the course of the argument in the Court of Appeal that this order had never been drawn up.

(2) By 18 & 19 Vict. c. 120, s. 105: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, ... or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same . . . .; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being to the vestry or board) . . . ."

By s. 225: "In every case where the amount of any damage, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner, or the amount of any damage, costs, or expenses, is by this Act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount shall, in case of dispute, be ascertained and determined by, and shall be recovered before, two justices . . . ."

By s. 226: "Where the amount of any compensation, or of any damage, costs, or expenses, is to be determined by, or to be recovered before, two justices, it shall be lawful for any justice, upon the application of either party, to summon the other party to appear before two justices at a time and place to be named in such summons; and upon the appearance of such parties, or in the absence of either of them upon proof of due service of the summons, it shall be lawful for such two justices to hear and determine the matter, and for that purpose to examine such parties or any of them, and their witnesses, on oath, and make such order, as well as to costs as otherwise, as to them may seem just."

By 25 & 26 Vict. c. 102, s. 77: "Where any vestry or district board shall, under the powers given by s. 105 of the firstly recited Act, have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just

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Crump, Q.C., and *Bramwell Davis*, shewed cause. It is clear that the magistrate did not refuse to exercise his jurisdiction, for he heard the summons and adjudicated upon it. Assuming that he was wrong in holding that the apportionment was binding upon him, his act amounted at most to an improper rejection of evidence, the remedy for which would be an appeal upon a case stated, and not a mandamus to hear and determine the summons. But the magistrate had no power to go behind the apportionment, which was conclusive under s. 77 of the Metropolis Management Act, 1862; upon proof of the apportionment he could only make an order for payment of the apportioned amount. If the amount apportioned upon the owner is too large, his proper remedy is to bring an action for the excess under s. 105 of the Metropolis Management Act, 1855. [He cited *Reg.* v. *Richards* (1); *Nesbitt* v. *Greenwich Board of Works.* (2)]

Horace Kent, in support of the rule. Under the statute the district board of works is entitled to charge the owners the cost of paving works only, and the gross sum to be apportioned must not include any expenditure in respect of anything not authorized by the Act. Assuming that a wrong thing has been included in the amount, the duty of determining this and thereby determining the amount of the apportionment is, by ss. 225, 226 of the Act of 1855, cast upon the magistrate. In the present case the apportionment cannot be in itself conclusive, as it might perhaps be in the case of expenses which had been merely estimated; here the expenses are alleged to have been actually incurred, and the owners who are chargeable have a right to know that they have been incurred in respect of matters which

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and expedient so to do; and any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments . . . . and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board."

(1) 20 L. J. (Q.B.) 351.

(2) Law Rep. 10 Q. B. 465.

the board had jurisdiction under the Act to carry out; the evidence was, therefore, admissible to shew that expenses which were not paving expenses at all were included in the total amount, and that the apportionment was, therefore, wrong. In *Poplar Board of Works* v. *Love* (1), the Court inquired into these matters, and the question of jurisdiction to make such an inquiry cannot depend upon whether the proceeding to recover the apportioned amount is by action or by summons.

Secondly, the refusal of the magistrate to hear the evidence amounted to a refusal by him to exercise jurisdiction on a distinct head of the inquiry, and a mandamus to hear and determine is the proper remedy.

[He also cited *Whitchurch* v. *Fulham Board of Works* (2); *Vestry of Mile End* v. *Whitechapel Union.* (3)]

LORD HALSBURY, L.C. I am of opinion that this rule must be made absolute. The proceeding against the applicants was taken under the Metropolis Management Act, 1855, as amended by the Act of 1862, and in effect called upon them to pay 24*l.* 10*s.* due and payable by them to the Lewisham District Board of Works, and the question for us is whether the proceedings of the board were so conclusive in their nature as to justify the learned magistrate in refusing to hear the evidence tendered to him. The Divisional Court refused to grant a rule for a mandamus upon the ground that, whether the magistrate was right or wrong, all he did (upon the hypothesis of his being wrong) was improperly to reject evidence, and that the proper remedy being by appeal, the Court could not interfere by mandamus. No doubt a magistrate may improperly reject evidence, and the Court may be unable to set him right, and the question is, whether this case comes within that category. I think that it does not; the act of the magistrate was not a mere rejection of evidence, but amounted to a declining to enter upon an inquiry on which he was bound to enter; he has not merely rejected evidence, but has declined jurisdiction, and, therefore, the right of the applicants to call upon him to exercise his jurisdiction is enforceable by mandamus.

(1) 29 L. T. (N.S.) 915. (2) Law Rep. 1 Q. B. 233. (3) 1 Q. B. D. 680.

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Lord Halsbury, L.C.

The main question which we have to determine arises upon the Metropolis Management Acts, and, looking at the terms of the original Act, it is clear that it is part of the duty of a board of works seeking to recover these payments from adjacent owners to establish two things: first, that the subject-matter in respect of which the money is claimed is a subject-matter within the jurisdiction, or, in plain terms, that it is paving in respect of which they are seeking to recover; secondly, that the expenses have been actually incurred, and that they are, therefore, entitled to recover the amount. The magistrate was asked to enter upon an inquiry whether the subject-matter was paving or not, and it was suggested that the board had expended money on works which were wholly outside paving works. The magistrate took the view that he could not enter into the inquiry, and declined to do so, and the question for us is whether he was right. If so, no mandamus will lie; but if he was wrong, it is manifest that he absolutely refused to enter upon the inquiry and declined jurisdiction.

In the original Act of Parliament the estimate of expenses (with which, however, we have nothing to do in the present case) is made conclusive. But where the board is endeavouring to recover in respect of actual expenses incurred, it is only right that they should prove they were actual expenses. In the present case the objection was taken that this was proved by the evidence of the clerk, and that his evidence was conclusive; but there is nothing in the Act of Parliament to justify such a contention. The board were, in my opinion, bound to shew that these expenses were paving expenses incurred within the statute, though if they had once proved that fact I do not in any way say that the magistrate had jurisdiction to inquire into the propriety or extravagance of the expenditure: that might be to embark upon an idle inquiry. The board must, however, clearly establish to the satisfaction of the magistrate that the expenses were paving expenses and were actually incurred. In no other way could the inquiry be made; for until the question is raised before the proper tribunal the owners have no opportunity of ascertaining whether any improper charges have been included.

The Act of 1855 specifies in s. 225 the thing which is to be done, and in s. 226 it indicates the tribunal which is to determine it. Reading the two sections together, it seems clear that the magistrate is the appropriate tribunal to hear the two questions of whether the expenses were paving expenses and whether they were actually incurred. These questions he has in the present case declined to hear or determine; he has, therefore, declined jurisdiction, and the mandamus must go.

As to the summons itself, I doubt whether in any point of view its form is appropriate to the question intended to be determined; allegations with respect to the amount of the estimated expenditure have found their way into it, and their inclusion is wholly inappropriate. If the summons were framed under an earlier provision for the recovery of a proportioned part of the estimate, that would be one thing; but this form of summons is neither the one thing nor the other. In my judgment, the appropriate form of summons would be one which, after declaring that such and such expenses had been incurred by the board under the Act of Parliament, went on to claim such and such a sum, being a proportionate part of such expenses.

In one point the summons is open to misconstruction. It recites that a new street has been duly paved and the expense ascertained; but in my view the expense has never been ascertained within the meaning of the statute. It may be that the board is under the impression that when all the accounts have been examined the expenses have been ascertained; but, in my opinion, the Act of Parliament means an ascertainment by judicial authority—that is to say, by the magistrate under ss. 225 and 226. Perhaps in this case the magistrate has been misled by the word "ascertained" in the recital; but, however that may be, I think that upon this summons, as soon as the magistrate had ascertained that the expenses had not been in fact incurred, or that the matter was for any reason beyond his jurisdiction, it was his duty to dismiss the summons. This rule must, therefore, be made absolute.

LORD ESHER, M.R. I am of the same opinion. It seems that the summons before the magistrate was taken out by the

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board against the owners of certain houses, summoning them to shew cause why they had not paid the apportioned part of the actual expenses of paving the street to which the houses adjoin, and there is now an application for a mandamus upon the ground that the magistrate declined to exercise the jurisdiction given him by law. Now, the form in which he is said to have declined jurisdiction is, that he refused to hear certain evidence which was tendered before him, and it is suggested on behalf of the board that such refusal, at the most, only amounted to a wrongful refusal to receive evidence, and not to a declining of jurisdiction. The distinction between the two is sometimes rather nice; but it is plain that a judge may wrongly refuse to hear evidence upon either of two grounds: one, that even if received the evidence would not prove the subject-matter which the judge was bound to inquire into; the other, that whether the evidence would prove the subject-matter or not, the subject-matter itself was one into which he had no jurisdiction to inquire. In the former case the judge would be wrongly refusing to receive evidence, but would not be refusing jurisdiction, as he would in the latter. Here the magistrate does not say that the evidence tendered would not prove the fact that the claim of the board included matters outside the statute; he has refused to hear the evidence, even though it would prove that fact; he has, therefore, declined jurisdiction.

The summons was taken out under s. 77 of the Act of 1862, and the first point taken is that that section does not apply to owners of houses at all, but applies only to owners of land. I am clearly of opinion, however, for reasons given in the course of the argument, that under s. 77 houses and land are put in the same position, and that what can be done to the one can be done to the other, with an additional power as regards land. I take it, therefore, that the summons was under s. 77, and that there is matter introduced into it which is irrelevant, and I treat it as a summons for not paying an apportioned part of the actual expenses. The question is whether the magistrate is not bound to inquire (if the fact be disputed) whether the sum which is apportioned is an expenditure which has been incurred solely in respect of paving, and, if incurred solely for paving, whether it

has been actually expended. I will add, however, that I do not think that "expended necessarily" means actually paid.

It has been urged before us that the magistrate had nothing to do but to enforce the apportionment, and that he had no jurisdiction to inquire into the matter in dispute. After consideration, however, I fail to see how, assuming the objection that the apportionment included other than paving expenses to be a true one, it could in the present case be raised in any other manner or before any other tribunal. The tribunal may, under the statute, be a judge and jury, for the apportionment may be enforced by action; or the tribunal may be a magistrate; and the same point might arise in an action, if that form of proceeding be chosen by the board, as in a summary proceeding before a magistrate; but I can see no means of taking the objection until it is sought before one or other of these tribunals to enforce the apportionment. I am unable to see that certiorari is the appropriate remedy in this case; for the mere finding of the board that the sum has been expended affects nobody until he is called upon to pay; and, therefore, if the owner cannot enter into this inquiry before the magistrate nobody can, and the board would be able to wield an absolutely despotic power, which the legislature never intended that it should exercise. I think, therefore, that the magistrate might inquire at least so far as to determine whether the expenditure incurred is for paving and for paving only, and whether the amount has been actually expended. I am content to say that, if it be proved to the magistrate that the apportionment is incorrect (that is, that it includes other than paving expenses, or that the amount has not been actually expended), he cannot enforce the apportionment against the owner.

FRY, L.J. I am of the same opinion, and will only add a few words upon the construction of the statutes. By s. 105 the board of works had power in certain events to pave a new street, and to recover the expenses from the owners and occupiers of the adjoining property. The surveyor had to make an estimate of the expenses, and that estimate was conclusive; and the whole of that estimated amount could be recovered from all the adjoining

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owners, there being no provision for apportionment. It was further provided that, if the estimate proved to be either less or more than the actual expenditure, the board should adjust the sum actually raised with that which ought to have been raised. Then comes s. 225, by which, when no other mode of procedure is provided, the amount is to be ascertained and recovered before two justices. It is plain that the actual amount of the expenses for paving is a subject to be ascertained by the magistrate; no method of ascertaining it had been given by s. 105, but s. 225 did require the amount to be ascertained before it could be recovered by the board. The ascertainment must, therefore, have been by the magistrate. Under that section it is clear that the magistrate could not decline to enter upon the inquiry.

Is this state of the law altered by the Act of 1862, which, it must be remembered, is by s. 110 to be read together with the Act of 1855? The scheme of s. 77 of the later Act is shortly this: it gave a direct mode of recovering the actual expenses, while it did not repeal the existing power in the board of recovering the estimated expenses. In the next place, the section was intended to include owners of land, the liability having previously been solely that of owners of houses. Thirdly, power was given to the board to charge owners of land less than owners of houses; and lastly, they had power given them to make an apportionment—that is, a power to apportion not merely as between owners of land and owners of houses, but also as between owners of land and owners of land, and owners of houses and owners of houses. The apportioned amount may be recovered by action or by summary proceedings. Reading those provisions in connection with those of s. 225 of the earlier Act, it is clear to me that the ascertainment of the actual amount expended cannot be withdrawn from the consideration of the magistrate. In the present case he has declined to ascertain that amount, and I think, therefore, that he has declined jurisdiction.

LOPES, L.J. I am of the same opinion, and will only make one observation as to the appropriateness of the remedy by mandamus. In my opinion, the magistrate in acting as he did

was not merely rejecting evidence — that is to say, evidence relating to a particular inquiry; he was, in my judgment, declining jurisdiction as to the whole inquiry, and in such a case mandamus is the proper remedy. The magistrate ought to hear evidence as to whether the expenses are in respect of matters included in the Act of Parliament, and as to whether they have been actually incurred; and as he has refused to hear evidence on these points, the mandamus must go.

Order absolute for a mandamus.

Solicitor for applicant: *R. Kent.*

Solicitor for Lewisham Board of Works: *J. Laidman, Lewisham.*

W. J. B.

THE QUEEN *v.* GAISFORD.

Nov. 2, 3.

Justices—Disqualification—Bias—Pecuniary Interest as Ratepayer.

At a vestry meeting summoned by a district surveyor to consider (inter alia) the obstruction of a highway by the defendant, who had deposited and left a heap of earth and manure by the side of the highway, a justice of the peace moved a resolution calling upon the defendant to remove the heap. The defendant having failed to remove the heap, a summons was taken out against him by the district surveyor for depositing the heap to the obstruction and annoyance of the highway, and for failing to remove it after notice. The justice who had moved the resolution, and who was a ratepayer of the parish, sat and adjudicated with another justice upon the summons, and made an order directing the heap to be removed and sold, and the proceeds of the sale to be applied to the repair of the highway:—

Held, that the justice was disqualified from adjudicating upon the summons, for the part taken by him in moving the resolution afforded ground for a reasonable suspicion of bias on his part, though there might not have been bias in fact, and upon the further ground that as a ratepayer he was pecuniarily interested in the result of the summons.

RULE nisi for a certiorari to bring up and quash an order that a district surveyor should remove a heap of earth from a highway in his district and sell the same. The facts were shortly as follows:—

For many years one Sayers had been in the habit of depositing earth, seaweed, and manure upon a piece of land at the side of a highway in the parish of West Tarring, and complaints had been made that the drainage of the highway was thereby

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impeded. At a vestry meeting called by the surveyor of highways for the purpose of considering various matters concerning the highways in the parish, Mr. Thomas Gaisford, who was a ratepayer in the parish, and also a justice of the peace, proposed a resolution that Sayers be called upon to remove the heap. Sayers having failed to remove the heap, a summons was taken out against him by Gardner, the surveyor of highways, under 5 & 6 Wm. 4, c. 50, s. 73, charging him with having laid the soil on the land to the obstruction and annoyance of the highway, and with leaving it there after notice had been given him to remove it. The summons was heard before two justices, of whom Gaisford was one; and in the result an order was made that the surveyor should remove the heap and sell it, and apply the proceeds to the repair of the highway. It was admitted that at the time he appeared to the summons Sayers was aware that Mr. Gaisford had been present at the vestry meeting; but it was said that he did not know that the latter had taken such a prominent part in the matter. A rule nisi was then obtained for a certiorari to Gaisford and Gardner to bring up and quash the order on the ground (inter alia) that Gaisford was interested in the matter of the summons.

Raven, for the surveyor, shewed cause. There was no bias in fact on the part of the justice. The prosecution was not instituted by him, but by the surveyor of highways, nor had he such a substantial interest, pecuniary or otherwise, in the result of the summons as would make it likely, within the principle of the decision in *Reg.* v. *Handsley* (1), that he should be biased. [He was stopped.]

Gore, in support of the rule. The justice was disqualified from acting upon two grounds. First, he was pecuniarily interested as a ratepayer in the result of the summons. Such a pecuniary interest need not be substantial: *Reg.* v. *Recorder of Cambridge* (2); it is sufficient if such an interest in fact exists. Secondly, he was biased in fact, for he was the mover of the resolution in the vestry meeting which was really the basis of the prosecution, and without which the surveyor would not have

(1) 8 Q. B. D. 383. (2) 8 E. & B. 637; 27 L. J. (M.C.) 160

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taken out the summons; he was, in fact, both prosecutor and judge, and the case is, therefore, within the decision in *Reg.* v. *Milledge.* (1)

The case of *Reg.* v. *Farrant* (2) is clearly distinguishable, for there the object of the justice in sitting was really to make peace between the parties. [He was stopped by the Court.]

Raven, in reply. The presence of the justice at the vestry meeting did not make him a prosecutor; the only prosecutor was the surveyor, for the resolution was wholly unnecessary to a prosecution. The suggested pecuniary interest is altogether too minute and could not have affected his conduct.

MATHEW, J. I am of opinion that this rule must be made absolute. Two grounds of objection have been taken to the decision of the justice: first, it is said that he has taken such a part in initiating these proceedings that he must be deemed to be within the rule disqualifying a magistrate from sitting on the ground of bias; secondly, the more technical point is taken that he had a pecuniary interest in the result. It was argued on his behalf that it was incumbent on the complainant to shew that the justice was in fact influenced; but, in my opinion, it is sufficient to shew, as was held in *Reg.* v. *Milledge* (1), that he might have been influenced; for in such a case it is not likely that a magistrate should knowingly be under the influence of an improper bias, although he may be placed in such a position as to be influenced, or to run the risk of being influenced, unconsciously to himself, in his decision.

The facts are simple. The magistrate was a ratepayer of the district, and attended a vestry meeting called by the district surveyor, where the question was discussed whether legal proceedings should be taken against the applicant for obstructing the highway; and the magistrate himself moved the resolution which was the foundation of the legal proceedings subsequently taken. A summons was afterwards issued against the applicant upon the information of the surveyor, and came on for hearing before the same magistrate and another. It appears that the applicant knew that the magistrate had been present at the

(1) 4 Q. B. D. 332. (2) 20 Q. B. D. 58.

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Mathew, J.

vestry meeting, but was not aware of the prominent part which he had taken in the proceedings. An adjournment was applied for by the applicant's solicitor, but refused, and the case was heard and the order complained of made. Upon the authorities it is clear that the course adopted was wrong, and that the magistrate ought not to have adjudicated upon the summons, although he was, no doubt, unaware of the objection to his acting. All these authorities are summarized in the case of *Leeson* v. *General Council of Medical Registration and Education* (1); and I need only add that the decision in *Reg.* v. *Milledge* (2) is as nearly as possible in point in the present case.

The second objection, that the magistrate was pecuniarily interested as being a ratepayer in the parish, is a highly technical one; but we must deal with it. Under the Public Health Acts magistrates and others are in many cases relieved of this objection; but where there is no statutory relief, the objection remains. On both grounds, therefore, the objection to this order has been made out; and this rule must be made absolute with costs against the local authority.

A. L. SMITH, J. I am of the same opinion, and think that the magistrate was in this case under an incapacity to adjudicate upon the summons. It is well-known law that the same person shall not act both as accuser and judge; and also that a man shall not act as a judge in a case in the decision of which he has a pecuniary interest, unless relieved by statute; the fact that a man has even the slightest pecuniary interest operates to disqualify him from adjudicating upon a case; and there is here no statutory relief from such disqualification. On the question of bias, apart from pecuniary interest, I entirely agree with the law as laid down by Cockburn, C.J., in *Reg.* v. *Milledge.* (2)

Rule absolute for a certiorari.

Solicitors for applicant: *Snell, Son, & Greenip, for Lamb & Gates, Brighton.*

Solicitors for respondent: *Wood, Bigg & Co., for Maurice Goodman, Worthing.*

(1) 43 Ch. D. 366.

(2) 4 Q. B. D. 332.

W. J. B.

POUNDER *v.* NORTH EASTERN RAILWAY COMPANY.

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Nov. 13, 14, 17.

Railway Company—Negligence—Duty to Passenger—Assault by Fellow Passenger, Liability of Company for.

In an action against a railway company to recover damages for assaults committed upon the plaintiff whilst travelling upon the defendants' railway, it was proved that the plaintiff had been employed in the eviction of pitmen from their houses, and had thereby incurred the ill-will of the pitmen in the neighbourhood in which he was travelling; but that when he took his ticket the defendants' servants had no notice that he was exposed to greater danger than one of the ordinary travelling public; that before the train started he was threatened, in the hearing of some of the defendants' servants, with violence by a number of pitmen at the station, and got into the guard's van for safety, but was removed and placed in a third-class carriage by the defendants' servants, who at this time knew that he had been engaged in the evictions and feared violence from the pitmen; that pitmen crowded into the compartment in which he was, thereby greatly overcrowding it; that the defendants' servants, when applied to by him, did nothing towards attempting to get the pitmen out, or to get the plaintiff a seat in another carriage; that he was assaulted and injured by the pitmen during the journey to the first station at which the train stopped; that at that station the pitmen got out of the compartment and others got in, and repeated the assaults upon him; that this happened at each station at which the train stopped, and at each station he complained of the assaults to the guard, who did nothing to secure his safety:—

Held, that there was no evidence of a breach by the defendants of any duty to the plaintiff arising out of the contract of carriage, and therefore that they were not liable in the action.

Appeal from a judgment of the judge of the county court of Durham, holden at Hartlepool, in an action to recover damages from the defendants for assaults committed upon the plaintiff whilst travelling upon the defendants' railway.

The following statement of facts is taken from the judgment of A. L. Smith, J.:—

It was proved that the plaintiff, as one of the travelling public, took and paid for a third-class ticket for conveyance from Sunderland to Hartlepool by the defendant company, and that, when he did so, the company had no notice that he was exposed to any greater danger than one of the ordinary travelling public. As a matter of fact, the plaintiff was what in Durham of late has been known as a "Candy Hall man," that is, a man engaged upon the

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eviction of pitmen from their houses consequent upon disputes between them and their masters. For this reason the plaintiff had incurred the ill-will of pitmen in parts of that county, and was in danger of being molested by them. Having taken and paid for his ticket, the plaintiff, accompanied by two other "Candy Hall men," attempted to ride in the guard's van; but they were not allowed to do so, it being against the company's rules that this should be done, and the plaintiff and his two friends were placed by a servant of the company in a third-class carriage in which were then seated six or seven unexceptionable passengers. The carriage was constructed to hold ten people. Evidence was given that at this time the company's servant was aware that the plaintiff was a "Candy Hall man," and that he feared violence from pitmen at the station; that after the plaintiff was seated in the carriage six or seven pitmen did rush in; that the company's servants did nothing towards either attempting to get the pitmen out, or to get the plaintiff a seat in another carriage, and that the train started with the six or seven pitmen in the overcrowded carriage in which the plaintiff and his two friends were travelling; that during the journey to the first station at which the train stopped, viz., Ryhope, the plaintiff was assaulted by the pitmen; that at Ryhope these pitmen got out, and that another relay of pitmen then got in, and repeated the assault upon the plaintiff. For these assaults, which were obviously the independent acts of the assailants, wholly unconnected with the company, the action was brought against the company, and the county court judge held the defendants liable, and assessed the damages at 5*l*.

The county court judge stated that he was of opinion that the allowing the carriage to be overcrowded, and especially after notice that the pitmen were threatening and intending to assault the plaintiff, and also the not removing either the pitmen or the plaintiff from the carriage at two different stations, was negligence on the part of the officers or servants of the defendants, and that the assault was the consequence of such negligence, and under the circumstances not too remote.

The facts, as stated in the head-note to this report, are taken from the judgment of A. L. Smith, J., and from the county court judge's notes of the evidence given at the trial.

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Asquith, Q.C. (*John Digby*, with him), for the defendants. There is no evidence to shew any breach of duty by the defendant company, and the learned county court judge ought to have non-suited the plaintiff. There is no duty on a railway company to protect passengers who may be unpopular from being assaulted in consequence of that unpopularity. They are not bound to keep a sufficient staff to prevent the possibility of passengers who are unpopular being assaulted. There was no breach of any duty which the defendants owed to the plaintiff. The case is similar to that of *Jackson* v. *Metropolitan Ry. Co.* (1) [He was stopped.]

J. G. Barnes, Q.C. (*Robson*, with him), for the plaintiff. The contract of a railway company with a passenger is to carry him safely and with reasonable care, having regard to the ordinary incidents of railway travelling; and, in order to enable the company to carry out that contract, their by-laws empower them to remove from their carriages persons who so conduct themselves as to interfere with the comfort and safety of their fellow-passengers. The ordinary incidents of a journey by rail are that the passenger has a seat to himself, and is not molested by others, and it is the company's duty to secure that condition of safety and comfort. In *Jackson* v. *Metropolitan Ry. Co.* (2), the judgments in all the Courts establish that it is negligence in a railway company to allow overcrowding in their carriages. There is, therefore, here a clear primâ facie case of negligence by the defendants, and there is ample evidence of negligence to be found in the county court judge's notes. The omission of the defendants' servants to take any means whatever to protect the plaintiff, though they knew that he and his companions were threatened with, and had sustained, violence, is some evidence of negligence. It was no part of the defendants' case that there was an overpowering mob which their servants were powerless to contend with at the various stations on the journey. The evidence shewed that the defendants' servants might reasonably have anticipated what happened to the plaintiff. They were primâ facie guilty of negligence in allowing their carriage to be

(1) 3 App. Cas. 193.
(2) Law Rep. 10 C. P. 49; 2 C. P. D. 125; 3 App. Cas. 193.

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overcrowded, and cannot escape liability by alleging that the plaintiff's injuries were immediately caused by the intervening acts of third persons. The decisions in *Illidge* v. *Goodwin* (1) and *Clark* v. *Chambers* (2), apply.

[He also referred to *Guille* v. *Swan*. (3)]

Asquith, Q.C., in reply. The acts complained of here were the acts of independent persons, and had no connection with the overcrowding of the defendants' carriages.

[He referred to *Cannon* v. *Midland and Great Western Ry.* (4)]

Cur. adv. vult.

Nov. 17. The following judgment was read by

A. L. SMITH, J. In this case the plaintiff has recovered damages against a railway company for a series of assaults committed upon him by fellow-passengers whilst travelling upon the defendants' line. The mere statement of the case denotes its novelty; but it is insisted that there was evidence which supported the judgment of the learned county court judge; and, so far as it is material, it is as follows:—[The learned judge stated the facts as previously set out]. The cause of action, if any, which the plaintiff had against the defendants was for an act of omission, and this cannot be supported unless the plaintiff can in the first place establish a duty upon the defendants to do that which it is said they have omitted to do. What is the duty of a railway company to its passengers? It arises out of the contract, and must be determined upon the facts known to the contracting parties at the time of the contract. Ordinarily it is the duty of a carrier of passengers arising out of the contract of carriage to carry the passenger upon the contracted journey with due care and diligence, and to afford him reasonable accommodation in that behalf. If the carrier omits to perform either of these duties, he is responsible for the ordinary consequences arising to the ordinary passenger therefrom. There is no duty in these circumstances to take extraordinary care of a passenger by reason of any unknown peculiarity then attaching to him. It is

(1) 5 C. & P. 192.
(2) 3 Q. B. D. 327.
(3) 19 Johns. Sup. Ct. N. Y. 381.
(4) L. Rep. 6 Ir. 199.

said in the present case that the defendant company committed a breach of duty in allowing the carriage in which the plaintiff was travelling to become overcrowded, and that consequently they omitted to supply him with reasonable accommodation, which the House of Lords, in the case of *Jackson* v. *Metropolitan Ry. Co.* (1), had held to be evidence of negligence—i.e., breach of duty on the defendants' part. Be it so. But the obligation which the defendants undertook when they contracted with the plaintiff was that, if they omitted to supply him with reasonable accommodation, they would be liable for the consequences usually arising therefrom to one of the travelling public—not for consequences which might result to a man who required, whilst travelling, special protection for his safety, and which fact was unknown to the company when they contracted to carry him. To an ordinary passenger the consequences of not supplying reasonable accommodation, which is the breach of duty now set up, is certainly not his being assaulted by an independent tort feasor, which is the sole injury or loss complained of in the present case. The cases put in argument of the company putting a known lunatic, or a known biting dog, or a known leper, or a man known to be drunk and quarrelsome, into a carriage with one of the ordinary travelling public, have no bearing upon the present case, for the consequences likely to arise therefrom would be well known to the company when they contracted to carry the passenger. The consequences likely to arise from putting pitmen to travel with a passenger, at the time of the contract believed to be one of the ordinary travelling public, would not be that the pitmen should break the law and assault their fellow-passenger. This is the difference between the cases. For the reasons above, and I do not say there are not others, the judgment of the county court judge must be reversed, and judgment entered for the defendants, with costs here and below.

MATHEW, J. I entirely concur in the judgment which my learned brother has just pronounced, and I desire to add that we are not laying down in this case any new principle of law.

(1) 3 App. Cas. 193.

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It was agreed on all hands in the course of the argument what the obligation of a railway company in such a case is. The railway company are bound to take reasonable care for the safety of their passengers. The controversy was as to how that reasonable care was to be measured, and I am clearly of opinion that it can only be ascertained by reference to the ordinary incidents of a railway journey, and by reference to what must be taken to have been in the contemplation of the parties when the contract of carriage was entered into. The principle is very clearly illustrated by two very familiar cases: *Readhead* v. *Midland Ry. Co.* (1) and *Daniel* v. *Metropolitan Ry. Co.* (2) Now the learned counsel for the plaintiff was pressed to define the limits of obligation of a railway company, and he contended for the broad proposition that the railway company were bound to take reasonable care for the safety of their passengers under all circumstances. Suggestions were put to him whether a railway company was bound to protect a passenger from the consequences of an unexpected landslip, of a storm which could not have been foreseen, or of a riot occurring at a country station, and under pressure of those suggestions he was compelled to relinquish the advanced position he had taken up in the first instance—that a railway company were bound to take care under all circumstances for the safety of the passengers—and he fell back upon the position that a railway company are bound to take care for the safety of the passenger under such circumstances as those in this case. The truth is that no obligation is entered into by the railway company with reference to the exceptional and extraordinary circumstances affecting a particular individual. If the railway company were to be made liable for an assault under these circumstances, they would be liable for a murderous attack, and for loss of life in consequence, and might be made responsible under Lord Campbell's Act. Those instances shew that there can be no such obligation. I may say that I differ with hesitation from the judgment of a judge of so much experience as the learned county court judge in question; but

(1) Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379.
(2) Law Rep. 5 H. L. 45.

the principle of law seems to me perfectly clear, and the facts of this case come clearly within that principle. The judgment of the Court below must therefore be reversed.

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Judgment for the defendants.

Solicitors for plaintiff: *Turnbull, Tilly, & Mousir, for Turnbull & Tilly, West Hartlepool.*

Solicitors for defendants: *Williamson, Hill, & Co. for A. Kaye Butterworth, York.*

W. A.

[IN THE COURT OF APPEAL.]

C. A. 1892 *Feb.* 10.

HOW *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Practice—Appeal from County Court—Order of County Court Judge for New Trial—Verdict against Evidence—Determination of Point of Law—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

No appeal lies from the decision of a county court judge granting a new trial on the ground that the verdict was against the weight of evidence, if it appears that the judge applied the right rule of law in considering whether such new trial should be granted.

APPEAL from a decision of the Queen's Bench Division. (1)

In an action brought in the Leighton Buzzard County Court to recover damages from the defendants, a railway company, for the loss, owing to the alleged negligence of the defendants' servants, of certain calves sent by their railway, the jury found a verdict for the plaintiff, damages 30*l.*

Subsequently the county court judge, upon the application of the defendants, granted a new trial on the ground that the verdict was against the weight of evidence.

The county court judge, in his notes of the application for a new trial, stated that in considering the matter he had applied the principles laid down by the House of Lords in *Metropolitan Ry. Co.* v. *Wright* (2), and that he came to the conclusion on the facts that the verdict was such as no reasonable men could find.

The plaintiff appealed to a Divisional Court, who dismissed

(1) [1891] 2 Q. B. 496. (2) 11 App. Cas. 152.

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the appeal. The plaintiff then appealed from their decision to this Court.

J. W. Cooper, for the appellant. An appeal lies from the county court judge's decision, under s. 120 of the County Courts Act, 1888 (51 & 52 Vict. c. 43): *Murtagh* v. *Barry*. (1) The Court to which the appeal is brought may look at the evidence and see whether the judge has acted upon legal principles in granting a new trial. If the evidence in this case be looked at it will be seen that the judge has not acted within the principles stated in *Metropolitan Ry. Co.* v. *Wright* (2) with respect to granting new trials on the ground that the verdict was against the weight of evidence.

Shearman, for the respondents, was not heard.

LORD ESHER, M.R. I am of opinion that this appeal should be dismissed. Where a county court judge applies the right rule of law in considering whether or not a verdict is against the weight of the evidence, and comes to a conclusion having applied that rule of law to the facts of the case, neither the Divisional Court nor this Court can interfere with his decision. The question then becomes one of fact only, and no appeal lies from his decision on the facts. Here the county court judge, in considering whether the verdict of the jury was against the weight of evidence, took the judgments of the House of Lords in *Metropolitan Ry. Co.* v. *Wright* (2), and applied the rule of law stated in those judgments, and then came to the conclusion, on the facts, that the verdict was against the weight of evidence. Whether he was right or wrong in coming to that conclusion of fact is immaterial; no appeal lies from his decision.

FRY, L.J. I am of the same opinion. Sect. 120 of the County Courts Act, 1888, specifies the cases in which there is an appeal from the county court. There must be a determination or direction of the judge in point of law or equity, or an admission or a rejection of evidence. Of these cases the only one which can be involved here is "the determination of the judge in

(1) 24 Q. B. D. 632. (2) 11 App. Cas. 152.

point of law." The appellant must shew that there was a point of law, and a determination of it by the county court judge, in order to gain the right of appeal. In this case the judge, in stating the law, followed the judgments of the House of Lords in *Metropolitan Ry. Co.* v. *Wright* (1). What followed afterwards was a decision on a question of fact; and if he made an error, it was an error in fact.

Lopes, L.J. The question whether the verdict was against evidence is a question of fact which the county court judge has to decide. If he applies the right rule of law, the Court cannot interfere with his decision on the facts. Sect. 120 of the County Courts Act, 1888, distinctly specifies the different circumstances under which appeals can be brought from county courts. There must be a determination in point of law. Here the judge applied the right rule of law. There could be no appeal on the question of fact to the Divisional Court, and therefore no appeal to this Court.

Appeal dismissed.

Solicitors for the appellant: *Wilkinson, Butler, & Wilkinson, St. Neots.*

Solicitor for the respondents: *C. H. Mason.*

(1) 11 App. Cas. 152.

W. A.

1892
Jan. 12;
Feb. 15.

IN THE MATTER OF THE HOUSING OF THE WORKING CLASSES ACT, 1890. EX PARTE STEVENSON AND OTHERS.

Practice—Appeal—Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70, *Sched. II.* § 26 (*a*)—*Party dissatisfied with Award of Arbitrator—Refusal of Judge at Chambers to give leave to submit Question to Jury—Right of Appeal from such Refusal.*

By Sched. II. s. 26 (*a*) of the Housing of the Working Classes Act, 1890, it is provided, that in the cases therein specified the party dissatisfied with the amount of the compensation ascertained by any award under Part I. of the Act "may, upon obtaining the leave of the High Court, which leave may be granted by such Court or any judge thereof at chambers in a summary manner, and upon being satisfied that a failure of justice will take place if the leave is not granted, submit the question of the proper amount of compensation to a jury":—

Held, that a refusal by a judge at chambers to grant the leave above mentioned is not subject to appeal.

APPEAL from chambers.

The corporation of Manchester, as the local authority of Manchester, took compulsorily, under the powers vested in them by the Housing of the Working Classes Act, 1890, for the purposes of an improvement scheme under that Act, certain land of the claimant situate within their district. In an arbitration under that Act for the assessment of the compensation payable to the claimant in respect of the land so taken, the arbitrator awarded a sum of 3841*l.* The claimant, being dissatisfied with that amount, applied to Wright, J., at chambers for leave to submit the amount of compensation to a jury under s. 26 (*a*) of Sched. II. of the Act, which provides, that "Where the party named in any certificate issued under the provisions hereinbefore contained of the amount of the compensation ascertained by any award under Part I. of this Act . . . is dissatisfied with the amount in such certificate certified to be payable, and such amount exceeds one thousand pounds . . . the party dissatisfied may, upon obtaining the leave of the High Court, which leave may be granted by such Court or any judge thereof at chambers in a summary manner (1), and upon being satisfied that a failure

(1) These words "in a summary manner," as applied to a civil proceeding, occur also in the Local Government Act, 1888 (51 & 52 Vict.

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of justice will take place if the leave is not granted, submit the question of the proper amount of compensation to a jury."

Wright, J., refused the leave sought. The claimant appealed from that refusal to the Divisional Court.

Ambrose, Q.C., for the claimant.

Moulton, Q.C. (*Pankhurst*, with him), for the corporation of Manchester. There is a preliminary objection that no appeal lies from the refusal of the judge at chambers to grant the leave asked for. Appeal is the creature of statute, and this statute provides no appeal from the decision of the judge; nor is the judge's decision an "order" within the meaning of s. 50 of the Judicature Act, 1873, so as to bring it within the general provision that orders made at chambers are appealable. In the analogous case of *Lane* v. *Esdaile* (1), it was held that no appeal lies to the House of Lords from a refusal of the Court of Appeal to grant special leave to appeal from a judgment of the High Court in a case where the time limited for appealing has expired. The intention of § 26 (*a*), was that, although the party desirous of getting leave to go before a jury might elect whether he should make his application to the Court or to a judge, when once he had made his election he should be bound by it.

Ambrose, Q.C., for the plaintiff. Where a jurisdiction is given by statute to the Court or a judge, the judge in exercising it acts as the delegate of the Court, and although the statute gives no express power of appeal from the decision of the judge, such decision is nevertheless appealable, for it must be presumed to be intended that the Court should have power to review the decisions of its delegates. Thus, in *Teggin* v. *Langford* (2), it was held that a judge's order imposing costs in the matter of an interpleader heard at chambers might be reviewed by the Court,

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c. 41), which by s. 29 provides that certain questions may "be submitted for decision to the High Court of Justice *in such summary manner* as subject to any rules of Court may be directed by the Court." In *Ex parte County Council of Kent and Council of Dover* ([1891] 1 Q. B. at p. 727), Lord Halsbury, L.C., assented to the suggestion of counsel that those words referred merely to procedure, and were intended to enable the parties to dispense with the machinery of a writ or rule.

(1) [1891] A. C. 210.

(2) 10 M. & W. 556.

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notwithstanding that 1 & 2 Vict. c. 45, s. 2, which gave the judge at chambers jurisdiction to exercise all the powers in interpleader exercisable by the Court, gave no appeal from the order of the judge. Sect. 50 of the Judicature Act, 1873, provides that "every order made by a judge of the said High Court in chambers (except discretionary orders as to costs), may be set aside or discharged upon notice by any Divisional Court." The refusal of the judge in the present case is an "order" within that section.

[CAVE, J. No. That section only applies to orders made in the exercise of the ordinary jurisdiction of the Court, which this is not.]

In *Ex parte Pulbrook* (1), it was decided that an appeal would not lie from an order of a judge at chambers under s. 8 of the Law of Libel Amendment Act, 1888, allowing a criminal prosecution to be commenced against the proprietor of a newspaper for libel. But the ground of the decision was that it was a criminal proceeding within Order LXVIII. r. 1 (*a*)—a point which it would have been wholly unnecessary to consider if such an order was not an order within s. 50 of the Judicature Act, 1873.

LORD COLERIDGE, C.J. I am of opinion that in this case the preliminary objection must prevail. We have here to deal with a section of an Act of Parliament which gives in certain cases a limited and conditional right of appeal from an arbitrator to a jury. The section in question is s. 26 (*a*) of Sched. II. of the Housing of the Working Classes Act, 1890, which provides that, in the cases therein specified, the party dissatisfied with the amount of the compensation ascertained by any award under Part I. of the Act "may, upon obtaining the leave of the High Court, which leave may be granted by such Court or any judge thereof at chambers in a summary manner, and upon being satisfied that a failure of justice will take place if the leave is not granted, submit the question of the proper amount of compensation to a jury." Now, it is to be observed that the leave which is to be obtained, as a condition precedent to the right to appeal to the jury, is the leave of the High Court, not the leave of the High Court or of a judge thereof, but the leave of the

(1) [1892] 1 Q. B. 86.

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High Court only. And although such leave may be granted either by the Court itself or by a judge thereof at chambers, where it is granted by a judge at chambers it is granted by him, not as his own leave, but as the leave of the High Court. That being so, the claimant in this case, who was dissatisfied with the amount of the compensation awarded to him by the arbitrator, desired to appeal to a jury, and he accordingly applied for the necessary leave to a judge at chambers. The judge refused such leave, and the claimant now appeals from such refusal to this Court. The question is whether he can do so. I am of opinion that he can not. The judge when sitting at chambers for the purpose of hearing an application for leave to appeal to a jury, which leave I have already said would when granted be the leave of the High Court, was sitting as the High Court. And it is clear that there can be no appeal from the High Court to itself. This application must, therefore, be dismissed.

CAVE, J. I am of the same opinion. I think it is quite clear that there can be no appeal from the refusal of the judge at chambers to grant the leave asked for, and upon that branch of the case I need not add anything to what has already fallen from my Lord. But I was at one time inclined to think that although there was no appeal from the judge at chambers to the Court, the Court might have a concurrent jurisdiction notwithstanding his previous refusal, and that the party desiring to submit the question of compensation to a jury might, after having been refused leave by the judge at chambers, apply for leave to the Divisional Court, not by way of appeal from the judge, but by way of substantive application. I was a little led to that doubt by consideration of the Act of 47 & 48 Vict. c. 9, which was passed to amend the law as to appeals in bankruptcy from county courts. By that Act such appeals are directed to go to a Divisional Court of the High Court, and s. 2 of that Act provides that "the decision of such Divisional Court upon any such appeal shall be final and conclusive, unless in any case it shall seem fit to the said Divisional Court or to the Court of Appeal to give special leave to appeal therefrom." There is no doubt that under that Act you may first make an application to the Divisional Court,

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and then, if the Divisional Court refuses to give leave, you may make another application, not by way of appeal, but by way of substantive application, to the Court of Appeal. However, upon further consideration of the words of the section before us, I have come to the conclusion that the Bankruptcy statute to which I have referred is not analogous, and that there is no power here to make two concurrent applications. For the leave to be obtained here is not, as in the case of that Bankruptcy statute, the leave of one or other of two alternative bodies, but the leave of one body only, namely, the High Court. If Mr. Ambrose's contention is correct, and if, upon a refusal by the judge at chambers to grant the leave sought, the dissatisfied party is to be at liberty to apply afresh to the Court itself, I do not see why he should not equally be at liberty to apply to all the rest of the judges of the High Court in chambers seriatim, on the chance of getting the desired leave from one of them, for the words of the section are that the leave "may be granted by such Court or any judge thereof at chambers." But the improbability that such a result was intended compels me to the conclusion, that the true meaning of the section is, that although the application for leave may be made either to the Court or to a judge, when once the selection of the tribunal has been made, that selection is final, and the parties are to be bound by the decision of that tribunal whether it grants the leave or refuses it. The preliminary objection must prevail.

Appeal dismissed.

Solicitors for the claimant: *Stuart & Tull, for T. E. Jones, Manchester.*

Solicitors for the corporation of Manchester, *Austin & Austin, for Town Clerk, Manchester.*

J. F. C.

THE QUEEN *v.* BURROWS.

1891
Nov. 3.

Quo Warranto—Vestry Clerk—13 & 14 *Vict. c.* 57, *ss.* 6, 7.

An information in the nature of a quo warranto will lie to inquire into the validity of the election of a clerk to a vestry.

RULE calling upon one Burrows to shew cause why an information in the nature of a quo warranto should not issue against him to shew by what authority he claimed to exercise the office or franchise of vestry clerk for the parish of Tottenham.

R. Cunningham Glen, shewed cause. A writ of quo warranto will not lie in respect of the office of clerk to a parish vestry. Under 13 & 14 Vict. c. 57, s. 6, he is not removeable except by resolution of the vestry; he, therefore, holds his office at the will of the vestry, subject only to the veto to be exercised by the Local Government Board, who can themselves dismiss him. The principles regulating the granting of a writ of quo warranto are laid down in *Darley* v. *Reg.* (1), where Tindal, C.J., in giving his opinion in the House of Lords, says that the writ will lie "for usurpation of any office, whether created by charter alone or by the Crown, with the consent of Parliament, provided the office be of a public nature and a substantive office, not merely the function of a deputy or servant, held at the will and pleasure of others:" he must hold his office as an independent officer. In *Reg.* v. *Simpson* (2), it was held that the writ would not lie in respect of the office of assistant overseer, he being an officer liable to dismissal and holding his office merely at will. Nor will it lie in respect of the office of superintendent registrar: *Ex parte Parry* (3), though that officer is appointed for life by the guardians, who retain no power of dismissal, the only power of dismissal being in the registrar-general; he is not a mere deputy, but the holder of a substantive office. It is clear, however, that a vestry clerk is a mere deputy or servant; for by 13 & 14 Vict. c. 57, s. 9, the overseers and churchwardens are not freed from the obligation to perform the duties themselves,

(1) 12 Cl. & F. 520. (2) 19 W. R. 73.
(3) 3 Times Rep. 649.

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though they may appoint a vestry clerk as a deputy. In *Reg.* v. *Kirby* (1), it is true that a rule nisi was granted in respect of this office; but the point here raised was not taken, and the rule was discharged on its merits.

[MATHEW, J. How do you distinguish the case from *Darley* v. *Reg.*? (2) The duties of a vestry clerk are prescribed by statute, and they are none the less his duties because the churchwardens and overseers are not discharged from performing theirs.]

He is the mere servant or deputy of the churchwardens and overseers; he cannot issue process without their authority, and he has to keep their accounts.

[*Channell, Q.C.*, referred to *Reg.* v. *Guardians of St. Martin's-in-the-Fields* (3).]

That case is different; it was held that the writ lay for the office of clerk to the guardians; but that office is undoubtedly a freehold—a franchise from which the holder is only removeable for neglect or improper conduct. The proper remedy in the present case is a mandamus to hold a fresh election.

Channell, Q.C., and *R. M. Bray*, in support of the rule, were not called upon.

MATHEW, J. I do not think that this objection can prevail. The only answer suggested is that the office of vestry clerk is not of a public nature; but it is held under an Act of Parliament, in which the duties of the office are pointed out with great precision, and in my judgment it is an office sufficiently public in its nature and sufficiently secure in its tenure to bring it within the class of cases in respect of which the proceeding by way of quo warranto is an available remedy. It is sufficient to point to one of the duties cast by statute upon this officer, that of the preparation of the jury lists, which is in itself a duty of very considerable public importance, and which is imposed, not upon the churchwardens and overseers, but upon the vestry clerk.

I desire to add a few words as to the case of *Ex parte Parry* (4), where a similar rule to the present was refused. In that case,

(1) 1 B. & S. 647.
(2) 12 Cl. & F. 520.
(3) 17 Q. B. 149; 20 L. J. (Q.B.) 423.
(4) 3 Times Rep. 649.

however, the previous decisions were not gone into at length, and many of them seem not to have been brought to the attention of the Court. The law we are now administering is not new law; its principles are expounded with great clearness in *Darley* v. *Reg.* (1), which is entirely analogous to the present case; and applying the principles there laid down, I can come to no other conclusion than that the office of vestry clerk is one of a public nature, in respect of which a writ of quo warranto will lie.

A. L. SMITH, J. I am of the same opinion. The case law upon the subject starts with the decision, in 1846, of *Darley* v. *Reg.* (1), where it was held that the writ would lie in respect of the office of a county treasurer, and rules were laid down as to the cases where it would lie and where it would not. Then, in 1851, the question arose in *Reg.* v. *Guardians of St. Martin's-in-the-Fields* (2), with respect to the office of clerk to guardians, and after full argument the Court held that it was bound by the decision in *Darley* v. *Reg.* (1), and applied the law there laid down to the case then under consideration. In the course of his judgment, Erle, J., says: "Three tests of the applicability of a quo warranto are given by *Darley* v. *Reg.* (1)—the source of the office, the tenure, and the duties. The source here is a statute." Why is not a statute the source of the office in this case as in that? Then he says, "The tenure is secure enough to satisfy the rule:" so it is in the present case; and he proceeds, "No definition of public duties has been given." On this point it seems to me that the duties of the clerk to a board of guardians are not more public in their nature than the preparation of the jury lists. Whether, therefore, we regard its source, its tenure, or its duties, the office of vestry clerk falls within the rules laid down in *Darley* v. *Reg.* (1), and commented upon by Erle, J.

Then, in 1861, in the case of *Reg.* v. *Kirby* (3), a writ of quo warranto was actually granted in respect of this very office of vestry clerk. It is true that in that case the point was not taken; but it is certain that the two very eminent counsel who shewed cause against the rule, having the previous cases in their

(1) 12 Cl. & F. 520. (2) 17 Q. B. 149; 20 L. J. (Q.B.) 423.
(3) 1 B. & S. 647.

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A. L. Smith, J.

minds, would have taken the point had they thought it could be seriously argued. In 1862, in *Reg.* v. *Acason* (1), a writ was granted in the case of a superintendent registrar, and the point that it would not lie was again not taken. Then, in 1870, an attempt was made to obtain a quo warranto in the case of an assistant overseer; but the Court, in *Reg.* v. *Simpson* (2), in discharging the rule nisi, there said that a quo warranto was an expensive method of settling the question. Lastly, there came, in 1876, what I cannot forbear to call the unfortunate decision in *Reg.* v. *Parry* (3), to which I was myself a party, where we held that quo warranto would not lie in respect of the office of superintendent registrar. As to that case, I will only say that the previous cases do not appear to have been cited to us, and that we did not appreciate them as we do now. If the point there decided were to come again before me, I should reconsider my judgment in that case.

Objection overruled.

The case was then heard on the merits.

Solicitors for applicant: *Fowler & Co.*
Solicitor for respondent: *F. Shelton.*

(1) 8 Jur. (N.S.) 841. (2) 19 W. R. 73.
(3) 3 Times Rep. 649.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1892
Feb. 29.

MUNDAY *v.* NORTON.

Practice—Trial before Official Referee—Application to Divisional Court—Appeal from Order of Divisional Court—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 45—*Judicature Act*, 1884 (47 & 48 *Vict. c.* 61), *s.* 8—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 14.

Where an order has been made under s. 14 of the Arbitration Act, 1889, that the whole cause or matter, or any question or issue of fact arising therein, shall be tried before an official referee, no leave to appeal is required from an order of the Divisional Court on an application made to that Court to review the decision of the official referee.

THIS was an appeal from a judgment of a Divisional Court on an application to refer back to the official referee the action which had been referred to him for trial under s. 14 of the Arbitration Act, 1889.

Gregson Ellis, for the plaintiff, took a preliminary objection that no appeal would lie without the leave of the Divisional Court. This is a compulsory reference to arbitration, and under Order LIX., r. 3, the defendant was entitled to apply to the Divisional Court to set aside the award or certificate. Then by s. 8 of the Judicature Act, 1884, the provisions of s. 45 of the Judicature Act, 1873, are to apply to such an appeal, and the last mentioned section makes the determination of the Divisional Court final, unless special leave is obtained to appeal to this Court, and the defendant has not obtained leave. A similar point is said to have been raised on the appeal to this Court in *Proudfoot* v. *Hart* (1), on a reference for trial under s. 57 of the Judicature Act, 1873, but no note of it appears in any report.

H. Kisch, for the defendant, was not heard.

LORD ESHER, M.R. This case was referred to the official referee for trial, and after he had tried it and given judgment there was an appeal to the Divisional Court asking for a new trial, and on their decision there is an appeal to this Court. By the general words of the Judicature Act, 1873, s. 19, there

(1) 25 Q. B. D. 42.

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would be an appeal against this decision as a judgment or order of the High Court; but it is said that s. 8 of the Judicature Act, 1884, prevents such an appeal, unless by special leave. A similar point is said to have been before this Court in the case of *Proudfoot* v. *Hart* (1), and this Court is said to have overruled the objection on the ground that the reference in that case was a reference for trial under s. 57 of the Judicature Act, 1873. The question arises, Is that the view to be taken of the case before us? Was it a reference of the cause for trial, or was it a compulsory reference to arbitration? To my mind it seems quite clear that it was not a compulsory reference to an arbitrator, and that s. 8 of the Judicature Act, 1884, does not apply to the case. The objection must, therefore, be overruled.

FRY, L.J. I am of the same opinion. Sect. 8 of the Judicature Act, 1884, applies to appeals brought after the commencement of the Act from an award or certificate of a referee or arbitrator, but only in cases where there has been a compulsory reference to arbitration. The Arbitration Act, 1889, by s. 14, enables the Court in certain cases to compulsorily refer the cause or matter, or any question or issue of fact arising therein, "for trial before a special referee or arbitrator agreed on by the parties, or before an official referee or officer of the Court." That has been acted on in this case, and there has been a reference to the official referee for the trial of the cause, in which reference he may pronounce judgment. He has done so, and an appeal has been brought on that judgment which is neither an award nor a certificate, nor was it made on a compulsory reference to arbitration. Consequently, s. 8 of the Judicature Act, 1884, does not apply to this case, and thus no special leave to appeal from the decision of the Queen's Bench Division was necessary.

LOPES, L.J., concurred.

Objection overruled.

Solicitors for plaintiff: *Ellis, Munday, & Clerk.*
Solicitor for defendant: *H. Fereday.*

(1) 25 Q. B. D. 42.

A. M.

SOVEREIGN LIFE ASSURANCE CO. (In Liquidation) *v.* DODD. 1892 *Feb.* 4, 24.

Bankruptcy—Set-off—Mutual Credits or Dealings—Life Insurance Company—Winding-up—Policy not Matured at Commencement of Winding-up—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38.

The defendant in 1879 effected with the plaintiffs two policies of life insurance for 1000*l.* each, upon his own life from the date thereof to May 7, 1888, by which policies the plaintiffs contracted that, in the event of the defendant being alive on May 7, 1888, they would then pay the moneys assured to the defendant. In April and June, 1887, the defendant obtained two loans of 570*l.* and 600*l.* respectively from the plaintiffs upon mortgage of the policies. In August, 1887, a petition was presented for the winding up of the plaintiff company. The defendant continued to pay to the plaintiffs the premiums upon the policies down to May 7, 1888, but the moneys assured thereby were never paid to him. In July, 1889, a winding-up order was made. In June, 1890, the Court duly sanctioned an arrangement made under the Joint Stock Companies Arrangement Act, 1870 (to which arrangement, however, the defendant did not assent), whereby it was provided that the policies of the plaintiff company should be transferred to the S. Company, and that the holders of policies of the plaintiff company should, in full satisfaction of all claims upon the plaintiffs, accept certain reduced payments from the S. Company. The reduced sum which the defendant became entitled under such arrangement to receive from the S. Company amounted to 267*l.* in respect of each policy. In December, 1890, the plaintiffs brought an action against the defendant to recover the amount of the loans, and the defendant sought to set off against the plaintiff's claim the sums which but for the winding-up would have been payable to him upon the policies.

Held, by Charles, J., that the defendant was entitled to the set-off.

Action tried before Charles, J., without a jury.

The action was brought to recover the amount of two loans of 570*l.* and 600*l.*, with interest. The facts, which were not in dispute, were as follows :—

On February 5, 1879, the defendant effected with the plaintiffs, who were a life insurance company, two policies of 1000*l.* each, upon his own life from the date thereof to May 7, 1888, whereby the amount insured was to be payable to him if he was living on May 7, 1888, or to his executors if he died within the term of the insurance. On September 10, 1880, he obtained from the plaintiffs a loan of 320*l.* In April, 1887, an additional sum of 250*l.* was advanced to him by the plaintiffs, making altogether 570*l.* This sum was secured by a mortgage to the plaintiff's secretary

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of the first of the two policies above mentioned. In June, 1887, 600*l.* was advanced on a similar mortgage of the second policy.

On August 5, 1887, a petition to wind up the plaintiff company was presented, and on September 2, 1887, a provisional liquidator was appointed. On September 5 the secretary forwarded receipts to the defendant for his premiums. "The petition," he wrote, "is to be heard on Wednesday next; the object, I am informed, being to obtain a scheme for reduction of contracts." No arrangement, however, was made at that time for any scheme; and after the lapse of nearly two years, namely, on July 30, 1889, a winding-up order was made, and on September 17, 1889, a liquidator was appointed. Meanwhile, on May 7, 1888, the money insured by the defendant's policy became due to him. He had regularly paid all the premiums, both before and after the date of the petition to wind up.

On April 11, 1890, a deed of arrangement was entered into between the plaintiff company and the Sun Life Assurance Company, under the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), which was sanctioned by the Court on June 14, 1890. The defendant did not assent to the arrangement, but a majority in number, representing three-fourths in value, did assent. The deed recited, among other things, that it would be advantageous, in the opinion of the liquidator, to the persons claiming in the liquidation, to effect an arrangement under which the policies held by them on August 4, 1887, should be transferred on agreed terms to some other office, and that the liquidator considered that the terms of the agreement thereinafter expressed would, if sanctioned by the Court, be for the benefit of the persons interested; and then provided, in clause 1, for the issue of new policies by the Sun Life Assurance Company to policy-holders whose policies if subsisting would not have matured by August 4, 1890, guaranteeing, first, "the payment on death, or other time specified in the said policy, of the reduced sum set against the policy-holder's name in the thirteenth column of the second schedule thereto," and secondly, the payment at such times as aforesaid of a certain dividend payable out of the assets of the Sovereign Life Assurance Company.

By clause 2 it was provided that, "As to policies of the

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Sovereign Company which but for the said winding-up order would have matured between August 4, 1887, and August 4, 1890 . . . the Sun Company will within one month after proof of death and title, make the same reduced payments to the representatives of such policy-holders or their assigns, and on the same terms and conditions, as if such policy had been a subsisting policy, and had matured after August 4, 1890."

By clause 7 it was provided that, as the consideration for the obligations imposed on the Sun Company, the liquidator would from time to time pay over or transfer to the Sun Company all such parts of the assets of the Sovereign Company as would be properly applicable to meet the claims of the policy-holders of the Sovereign Company who were such on August 4, 1887.

Clause 11 provided as follows: "If this agreement is sanctioned by the Court, all policy-holders of the Sovereign Company who were such on August 4, 1887, shall accept the provisions hereof in full satisfaction of all claims on the Sovereign Company and the assets thereof." The deed further provided that the winding-up should be continued so far as might be necessary to settle the rights of all parties.

The reduced sums which, under clause 2 of the deed of arrangement, were set against the defendant's name in the thirteenth column of the 2nd schedule thereto, were 26*l.* in respect of each of his two policies; and the estimated dividends, payment of which was guaranteed to him out of the assets of the plaintiffs by the Sun company, amounted to 241*l.* on each policy.

In December, 1890, the plaintiffs, by their liquidator brought this action against the defendant to recover the sum of 1345*l.* 19*s.* 5*d.*, being the amount of the above-mentioned two loans and interest thereon. The defendant pleaded a set-off of the money which was payable to him by the plaintiffs in respect of his two policies on May 7, 1888. He also counter-claimed for the difference between the money so due on the policies and the amount of the loans; but the counter-claim was not insisted upon at the trial.

Lumley Smith, Q.C., and *H. Tindal Atkinson*, for the plaintiffs. A claim for the money assured by a policy which has not matured

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at the date of the petition to wind up the insurance company is not capable of being set off against a debt due by the policy-holder to the company. That was undoubtedly the law before the Judicature Act, 1875: *Ex parte Price, In re Lankester.* (1) By s. 10 of that Act the rules as to set-off in bankruptcy are indeed imported into the winding-up of companies: *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2); but it has never been decided that where there is a loan by the insurance company on the one hand and an immature policy on the other, those are "mutual credits or mutual dealings" within s. 38 of the Bankruptcy Act, 1883. A debt which owes its existence to something done after the commencement of the bankruptcy, cannot be held to be within the section: *In re Gillespie, Ex parte Reid & Sons.* (3) Here the petition to wind up, which by s. 84 of the Companies Act, 1862, is to be regarded as the commencement of the winding-up, was in August, 1887, and the defendant's right to the policy moneys only accrued as the result of the payment of premiums since that date.

But secondly, even if a policy-holder's rights under a policy not matured at the date of the petition can, as a general rule, be set off against a debt to the company under s. 38, that is not the case where, as here, the policy has been assigned as security for the debt; for the policy-holder can in such case have no rights under the policy at all until he has paid the debt.

Thirdly, the deed of arrangement by its very terms extinguished the defendant's claims against the plaintiffs—it operated as a novation. If the defendant cannot now sue the plaintiffs upon his policies, as it is clear that he cannot, neither can he set off the moneys assured by them. It is true that the defendant was not an assenting party to the arrangement, but that makes no difference, for by s. 2 of the Joint Stock Companies Arrangement Act, 1870, the arrangement when sanctioned by the Court is binding on all the creditors.

Crump, Q.C., and *Morton Smith*, for the defendant. The fact that the amount of the defendant's claim upon his policies was not ascertained at the commencement of the winding-up is

(1) Law Rep. 10 Ch. 648. (2) 9 App. Cas. 434.
(3) 14 Q. B. D. 963.

immaterial. Any transaction which must in due course ripen into a debt may be the subject of set-off in bankruptcy. Thus anticipated damages for breach of a contract which a company by reason of its liquidation has become incapable of performing, may be set off in the winding-up under the mutual credit clause: *In re Asphaltic Wood Pavement Co., Lee and Chapman's Case.* (1) The debt which, in *In re Gillespie* (2) was held incapable of being set off, was one which arose wholly after the commencement of the bankruptcy, consisting of money due on the acceptance of a bill of exchange *accepted* after the date of the receiving order. Here the contract, out of which the defendant's claim arises, was made long before the winding-up commenced.

Secondly, the deed of arrangement does not affect the defendant's rights against the plaintiffs, for it only applies to policy-holders; but at the date of that deed the defendant was no longer a policy-holder, for his term of insurance expired, and his policies became "claims" upon May 7, 1888. And further by the very terms of clause 2 he is excluded from the class of policy-holders there dealt with; for that clause only applies to policies maturing by death, and not to policies maturing by effluxion of time, as was the case with the defendant's policies.

Thirdly, even if the deed does apply to the defendant, it does not affect his right of set-off. It cannot operate as a novation, for there can be no novation where there is no voluntary acceptance of a substitution of debtors, and the defendant did not assent to the arrangement. The effect of the deed was only to extinguish the defendant's right of action on the policies; it left him in the same position as a creditor in an ordinary bankruptcy, who, though precluded from recovering more than a dividend, is yet entitled to set off the balance of his claim against any debt due from him to the debtor.

Lumley Smith, Q.C., in reply.

CHARLES, J., having stated the facts as above set out, proceeded as follows: It was contended on behalf of the defendant that clause 2 of the deed of arrangement only applies to the case of a policy maturing by the death of the assured, and not to one

(1) 30 Ch. D. 216. (2) 14 Q. B. D. 963.

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which matured by reason of the event, other than death, on which the policy moneys became payable, having happened in the prescribed interval. But, looking at clauses 1 and 2 together, and bearing in mind that clause 1, in the case of policies maturing after August 4, 1890, expressly provides for payment of the reduced sums agreed upon "on death or other time specified in the said policy," I am unable to adopt that construction. I think the deed applies to all policy-holders, whether they are holders of ordinary policies or of what are termed "endowment assurances."

I must now inquire what would have been the position of the parties on May 7, 1888, when the defendant's policies became claims, if there had been no winding-up. At that date there was due from him to the plaintiffs the two sums of 570*l.* and 600*l.*, together with a small sum for unpaid interest, making altogether 1191*l.* 10*s.* 8*d.* There would at that date have been payable to him the amount of his two policies with bonuses—altogether a sum of 2113*l.* 4*s.* 6*d.*; and the Sovereign Company would, therefore, have had to pay the defendant the difference between these two sums. But it is clear from the terms of clause 11 of the deed of arrangement—by which the defendant, though not an assenting policy-holder, is bound—that he has lost all claim for this difference against the plaintiff company. He has rights against the Sun in respect of his two policies, and in due time will receive from the Sun a sum which is at present fixed at 267*l.* for each policy. But he can get nothing from the Sovereign, and his counter-claim, in which he had sought originally to recover the difference between 2113*l.* 4*s.* 6*d.* and 1190*l.* 10*s.* 8*d.*, was not seriously insisted on.

But the important question remains whether the plaintiff company can recover from him the amount of the loans made to him in 1887, in the events which have happened. The answer depends on whether the "mutual credit and set-off" section of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 38), applies to this case, for the effect of the 10th section of the Judicature Act, 1875, is to import the bankruptcy rules of set-off into winding-up, so as to entitle a defendant to set up in an action by the liquidator any matter which would form a ground of set-off in the

bankruptcy: see *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1)

Now, in the present case there was not, when the petition to wind up was presented on August 5, 1887, any actual debt due from the company to the defendant. There was, however, a liability which, if the defendant kept up his premiums, would mature into a debt in the following month of May. The defendant did keep up his premiums, and accordingly in May, 1888, after the petition, but before the winding-up order, which was not made until July 30, 1889, the defendant's claim became liquidated and ascertained. The winding-up, it is provided by s. 84 of the Companies Act, 1862, "shall be deemed to commence at the time of the presentation of the petition to wind up," and the plaintiffs contended that a line should be drawn at that date, and that no credit could be allowed to the defendant for any sum which became due to him afterwards. In support of this view, the case of *In re Gillespie, Ex parte Reid* (2) was relied on. There it was held, that where there are mutual dealings between a debtor and his creditors, the line as to set-off must, as a general rule and in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy; and applying that decision to a winding-up, the commencement of the winding-up must be taken, it was said, to be the critical period. But when the case cited is examined, it becomes clear, I think, that it is not applicable to the present case. The Messrs. Reid were at the date of the receiving order creditors of the bankrupts for 111*l.* 14*s.* 6*d.* Some days later the Messrs. Reid accepted a bill drawn on them by one Adams, which had been sent to the bankrupts by one of their customers to be placed to the credit of that customer's account. The bill was brought to them by the trustee, and they accepted it, but claimed a right to set off the amount payable by them against the sum due to them; and it was held they could not do so, the transaction being an entirely new one, and entered into by them after the commencement of the bankruptcy.

In the case now to be decided there was no new transaction. The loans on the one hand and the insurance on the other, were both prior in date to the winding-up petition, and there was, when

(1) 9 App. Cas. 434. (2) 14 Q. B. D. 963.

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the petition was presented, a debt due from the defendant, and a contract with him which would probably result—and has in fact resulted—in a debt due to him. This constituted, in my opinion, a mutual credit or mutual dealing within the meaning of s. 38 of the Act of 1883. The terms "mutual credit or other mutual dealing" are wider than the term "mutual debt," and the relation contemplated by the statute has been held to be established when the debt is immediately due from the one party, and only due on a future day from the other. The case of *In re Asphaltic Wood Pavement Co.* (1) supports this construction. It was there held that, under the mutual credit section, a claim by the liquidator of the company to receive certain moneys due under a contract with the company by the Commissioners of Sewers, was subject to a set-off for a breach of contract by the company, although that breach had not occurred until after the commencement of the liquidation. It was, nevertheless, a liability capable of being proved in the winding-up. "The question," said Cotton, L.J., at p. 224, "is whether it does not come under that mutual credit clause, s. 39 of the Bankruptcy Act, 1869. In my opinion it does. Mutual dealings in respect of which there are cross-claims are capable of being proved in the liquidation as well as the other claim which the liquidator has as against the commissioners. And why should it not be? It is argued that this is not a liability at the time, because there was no breach. At the time when the company commenced its liquidation it was under a contract which implied a liability to maintain these streets if it were required. It is now rendered impossible by the winding-up for the company to do that; and, in my opinion, though no notice had been given before the commencement of the winding-up, that is properly a liability the damages for which are capable of being proved, and if capable of being proved, are capable under the mutual credit clause of being set off against any claim by the liquidator as against the commissioners."

This language appears to me to apply exactly to the present case. Here there was a debt due at the commencement of the liquidation from the defendant, but there was also a subsisting

(1) 30 Ch. D. 217.

contract with the company that they would on a day certain, which arrived before the winding-up order, pay the defendant his policy moneys, less the amount of his loan. The only element of uncertainty was the possibility that the defendant would not pay his premiums. This element was removed by his duly paying them, and thereupon the sum due to him became capable of proof in the liquidation. I cannot see why, under these circumstances, the mutual credit section should not be held applicable. The case of *Ex parte Price, In re Lankester* (1), is not inconsistent with this conclusion. It was there held that the value of current policies arrived at in a winding-up is not a sum due at all, but only a sum arrived at for the purpose of regulating the proof of debts. It was not a debt, nor a sum which ever, in the proper sense of the word, would become payable as for money due under the mutual credit clause. This decision is not, in my opinion, applicable to a case where, long before the winding-up order, the policy money had actually become due.

My judgment, therefore, is for the defendant, with costs on his defence. Judgment on the counter-claim will be for the plaintiffs, with such costs, if any, as they may have incurred with reference to the counter-claim.

Judgment for the defendant on the defence.

Solicitor for plaintiffs: *J. Robinson.*
Solicitor for defendant: *N. Jourdain.*

J. F. C.

(1) Law Rep. 10 Ch. 648.

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Feb. 9.

[IN THE COURT OF APPEAL.]

DAWES *v.* THOMAS AND OTHERS.

Landlord and Tenant—Tithe Rent charge—Payment by Tenant—From what Rent deduction may be made—Tithe Act, 1836 (6 & 7 *Wm.* 4, *c.* 71), *s.* 80.

The 80th section of the Tithe Act, 1836, permits a tenant or occupier who shall pay tithe rent charge to deduct the amount thereof from the rent payable by him to his landlord, and he is to be allowed the same in account with his landlord.

A tenant paid the tithe rent charge, in respect of the land he occupied, for several years, during which he made no deductions, in respect of such payments, from the rent as it became due. On a further payment of rent becoming due and being demanded by the landlord, the tenant claimed under s. 80 of the Tithe Act, 1836, to deduct the aggregate amount of the payments so made by him in respect of the tithe rent charge in the previous years :—

Held, that each deduction in respect of a payment of tithe rent charge should have been made from the next payment of rent, and could not be carried into account in the payment of any subsequent rent.

APPEAL from the judgment of Wills, J., on further consideration.

The action was for excessive and illegal distress. The circumstances, so far as it is necessary to set them out, as bearing on the decision of the Court, were as follows. The defendant was tenant of a farm, and there was no agreement between him and the landlord as to the payment of the tithe rent charge issuing out of the farm. The tenant paid the tithe for several years, and, owing to a dispute as to the person on whom the liability to pay should fall and for other reasons, the payments of tithe were not deducted from the rent as it became due. The landlord died and the defendants took the property under his will, and, when the next subsequent rent became due, distrained for it. The amount of rent distrained for was less than the aggregate amounts paid by the tenant for tithes as above mentioned, and the questions were whether the tenant could under the Tithe Act, 1836 (6 & 7 Wm. 4, c. 71), s. 80, deduct, from rent due to the defendants, tithe rent charge which he had paid during his tenancy under their predecessors in title, and whether such a payment must be deducted from the next following payment

of rent or can be carried on and deducted from rent becoming due subsequently.

The 80th section of the Tithe Act, 1836, enacts that "any tenant or occupier at the time of such commutation who shall have signified his dissent from being bound to pay any such rent charge as aforesaid, or who shall hold his land under a lease or agreement providing that the same shall be holden and enjoyed by him free of tithes, and every tenant or occupier who shall occupy any lands by any lease or agreement made subsequently to such commutation, and who shall pay any such rent charge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with his said landlord."

The learned judge gave judgment substantially in favour of the defendants.

The plaintiff appealed.

Gwynne James, in support of the appeal. The tenant has a right to deduct the amount he has paid for tithes so far as he is not prevented by any Statute of Limitations. There is nothing in the statute limiting the right to deduct to the occasion when the next rent becomes due, nor is there anything to shew that the landlord may not be the landlord for the time being. The mere fact of the property changing hands ought not to limit the rights of the tenant under the statute.

A. T. Lawrence, contrà. The plaintiff should have deducted the tithe from the previous payments of rent to the defendants' predecessors in title. None of the rent coming into the defendants' hands under the distress is affected by the statute, for there has been no payment of tithe the amount of which can be charged against it. In any event the deduction can only be made, as in the case of land tax, from the current rent: *Andrew* v. *Hancock*. (1)

Gwynne James, in reply.

LORD ESHER, M.R. I do not propose to determine on the present occasion the question whether a payment of tithe in the time of one landlord can be deducted from rent due to a

(1) 1 B. & B. 37.

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successor. All I think necessary to determine is the question whether the deduction by the tenant must be made from the next rent which becomes due after payment of the tithe rent charge which he claims to deduct. Neither the landlord nor the tenant is personally liable under the Tithe Act, 1836, for the payment of tithe. The tenant when he pays it, as he must by reason of his goods being liable, cannot say that it is money paid to the landlord's use, and no right of action to recover it is given by the Act. There is but one right given, and that is to deduct the payment made for tithe from the rent payable to the landlord. Does that mean a right to deduct from the next rent payable, or from any subsequent rent? On the words of the Act, and in the absence of authority, I should put the former construction on it; and the authority of *Andrew* v. *Hancock* (1), a case decided before the passing of this Act, where similar words were construed in the way suggested, confirms the opinion that this must be the right view.

FRY, L.J. We have here to deal with tithe rent charge payable under the statute of Wm. 4, tithe being commuted for a rent charge issuing out of the land, and recoverable only by distress. The statute provides that the tenant who has paid such rent charge may deduct the amount from the rent payable by him to his landlord. The view expressed by Wills, J., seems to have been that, in order that the tenant may avail himself of a payment of tithe rent charge, he must bring it into account with the person who was his landlord when it was paid. I doubt whether that is right; but I do not decide this case on that point, for I am clearly of opinion that the section allows the deduction to be made only from current rent, and that if the tenant does not bring the payment into account at the next settlement with his landlord, he cannot allow the arrears to go on accumulating and then deduct the aggregate amount on some subsequent payment of rent. The nature of the case seems to indicate that the deduction ought to be made on payment of the current rent, and this view is confirmed by the case of *Andrew* v. *Hancock* (1) a case decided on the construction of an

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Act containing words similar to those found in the statute under consideration.

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LOPES, L.J. This is a case in which the parties—the landlord and the tenant—did not contract themselves out of the Act, which consequently applies. In my opinion, the words of the section indicate that the deduction is to be made from the next rent payable to the landlord. If so, it follows that, if a tenant has paid the rent charge in previous years, and has not deducted the amount in making the next payments of rent, he is not in a position to deduct the amount from rent subsequently payable. This view is supported by the decision in *Andrew* v. *Hancock*. (1) Wills, J., based his decision, as to part of the money paid by the tenant, on the contention that a deduction could only be made from rent due to the person who was landlord when the rent charge was paid by the tenant. I incline to think that, where there has been a devolution of title, the deduction may be made from the payment to the successor in title. I do not, however, base my decision on this ground, but on the other one—that the deduction must be made from the next payment of rent.

Appeal dismissed.

Solicitors for plaintiff: *Thomas White & Sons, for T. W. Garrold, Hereford.*

Solicitors for defendants: *T. H. Philpots, for T. Gwynne Powell, Brynmawr.*

(1) 1 B. & B. 37.

A. M.

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Feb. 2.

WHEAT, APPELLANT; BROWN, RESPONDENT.

Margarine—Margarine Act, 1887 (50 & 51 *Vict. c.* 29), *s.* 6—"*Exposure for Sale*"—*Parcels wrapped in Paper.*

By s. 6 of the Margarine Act, 1887, if margarine be "exposed for sale by retail," there shall be attached to each parcel thereof a label of the prescribed size and marked in the prescribed manner:—

Held, that the meaning of the words "exposed for sale" was not limited to such an exposure as would enable purchasers to see the margarine itself, but that margarine, when wrapped in paper so as to be invisible to the purchaser, might be exposed for sale within the meaning of the Act.

CASE stated by justices of West Hartlepool for the opinion of the Queen's Bench Division, under s. 33 of the Summary Jurisdiction Act, 1879.

The respondent was charged before the justices, upon the information of the appellant, an inspector of nuisances, "for that he did expose for sale by retail a parcel of margarine to which there was not attached, in such manner as to be clearly visible to the purchaser, a label, marked in printed capital letters not less than one and a half inches square, 'Margarine,' contrary to the form of the statute." (1)

(1) The Margarine Act, 1887 (50 & 51 Vict. c. 29), provides:—

Sect. 4: "Every person dealing in margarine, whether wholesale or retail, whether a manufacturer, importer, or as consignor or consignee, or as commission agent or otherwise, who is found guilty of an offence under this Act, shall be liable on summary conviction for the first offence to a fine not exceeding twenty pounds, and for the second offence to a fine not exceeding fifty pounds, and for the third or any subsequent offence to a fine not exceeding one hundred pounds."

Sect. 6: "Every person dealing in margarine in the manner described in the preceding section shall conform to the following regulations:—

"Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'Margarine' on the top, bottom, and sides, in printed capital letters, not less than three-quarters of an inch square; and if such margarine be exposed for sale, by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label, marked in printed capital letters not less than one and a half inches square, 'Margarine'; and every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, 'Margarine.'"

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From the statements in the case it appeared that the appellant went to the shop of the respondent, who dealt in butter and margarine at West Hartlepool, and asked him for a pound of shilling butter, advertised in the shop window as "Danish butter." The respondent thereupon handed to him, and he paid for, a parcel which the respondent took from among a number of similar parcels placed in view of the purchaser on a counter or shelf in the shop. The appellant could not see what was in the parcel sold to him, or in any of the other parcels from which it was taken, because all the parcels were wrapped up in paper. The word "Margarine" was printed on the wrappers, but there was no label attached to the parcels marked with the word "Margarine" in printed capital letters, not less than one and a half inches square, in such a manner as to be clearly visible to a purchaser, as required by s. 6 of the Margarine Act, 1887. The parcel sold to the appellant was margarine as defined by that statute.

The justices were of opinion, having regard to the expressions used by Cave and A. L. Smith, J.J., in *Crane* v. *Lawrence* (1), that in order to constitute exposure for sale within the meaning of s. 6, there must be an exposure of the margarine itself to view, and not merely an exposure of the package or parcel containing it. They, therefore, dismissed the information. The question for the opinion of the Queen's Bench Division was whether the justices were right in their decision.

Danckwerts, for the appellant. The view taken by the justices was wrong. The words "exposed for sale," in s. 6 of the Margarine Act, 1887, do not mean that the margarine itself, uncovered, must be in view of the purchaser. The justices have mistaken the effect of *Crane* v. *Lawrence*. (1) That case only decided that margarine which was placed behind a screen, and was not in any way visible to the purchaser, was not "exposed for sale" within the meaning of s. 6. The dicta of the learned judges, upon which the justices relied, were not necessary for the decision of the case.

Robson, for the respondent. The words "exposed for sale" in s. 6 of the Margarine Act, 1887, mean so "exposed" that the

(1) 25 Q. B. D. 152.

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purchaser may see the actual substance. The whole intention of the Act was to prevent purchasers from being deceived by the appearance of a substance which was not butter; and this is the object of the legislature in providing that, where margarine is exposed for sale by retail, a label with the largest letters mentioned in the section, shall be attached to every parcel. This was the view taken of the words "exposed for sale" by the judges who decided *Crane* v. *Lawrence* (1), where Cave, J., says: "The word 'exposed' may have different meanings according to the circumstances of the different cases in which it is used . . . . In the present case it must mean exposed to view. It is clear that the intention of the statute is that there shall be an exposure to the purchaser, in order that he may see what the article is, &c."; and A. L. Smith, J., says: "The words 'exposed for sale' mean exposed to view in the shop in the sight of the purchaser."

Danckwerts, replied.

LAWRANCE, J. The question which has been submitted to us by the justices is, "whether they were right in their decision," and we can answer that question only by considering the point of law stated by them in the case. They say that they were "of opinion that there must be an exposure of the margarine itself to view, and not merely of the package containing it." The answer to the question is, that the justices were wrong in the view which they took of s. 6 of the Margarine Act, 1887. It is the second part of that section which deals with the matter now before us. It provides that "if such margarine shall be exposed for sale, by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters, not less than one and a half inches square, 'Margarine.'" Now, but for some observations in the judgments in *Crane* v. *Lawrence* (1) I should have no difficulty whatever as to the meaning of those provisions. In my opinion, however, it does not appear that any such question was dealt with by the judges as has been suggested, and the judges do not say anything about the intention of the statute, in this part of s. 6, being to deal only with margarine actually

(1) 25 Q. B. D. 152.

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exposed to view. The ordinary sense of the words used in s. 6 is, that a parcel of margarine exposed for sale by retail must have a label in letters one and a half inches square, marked "Margarine," and the section applies to margarine "exposed for sale" in the ordinary sense of those words, whether it is wrapped up in paper or not. The case must be sent back to the justices with this expression of our opinion.

WRIGHT, J. I am of the same opinion. I entirely agree with the decision in *Crane* v. *Lawrence* (1), which was, in effect, that there was no exposure for sale when margarine was stored in a back room or cellar. The decision is simply that margarine which cannot in any sense be seen by the purchaser is not exposed for sale. In this case, the justices refused to convict the defendant upon the ground that the second part of s. 6 does not apply to margarine which is wrapped up in paper. That, in my opinion, is a wrong view of the section. The expression "exposed for sale," is a well-understood term, and cannot be limited so as to mean only "exposed to view." We do not decide that those parcels of margarine were in fact, in the position in which they were, exposed for sale; the justices must decide that. We send the case back to them with our opinion upon the point of law.

Appeal allowed.

Solicitor for appellant: *C. E. Baker, for H. Simpson, West Hartlepool.*

Solicitors for respondent: *Nash, Field, & Withers, for Hoyle, Shipley, & Hoyle, West Hartlepool.*

(1) 25 Q. B. D. 152.

W. A.

1892
Jan. 25.

CLARIDGE *v.* SOUTH STAFFORDSHIRE TRAMWAY COMPANY.

Bailment—Injury to Chattel by Negligence of Stranger—Action by Bailee—Measure of Damages.

The owner of a horse delivered it to the plaintiff, an auctioneer, for sale, with liberty to use it until sold. Whilst the horse was being driven by the plaintiff's servant along a highway, it was frightened by a steam tramcar of the defendants which was travelling at an improper speed. The horse, in consequence, plunged, fell, and injured itself. The accident was wholly due to the negligence of the defendants. The plaintiff brought an action to recover the diminution in the value of the horse:—

Held, that the plaintiff, being under no liability to his bailor for the injury to the horse, could not recover.

APPEAL from the county court of Staffordshire.

The owners of a horse sent it to the plaintiff, an auctioneer, to sell by auction, and gave him leave to use it until it was sold. Whilst the horse was being driven in the plaintiff's carriage along a street, it was frightened by a steam tramcar of the defendants which was travelling at an excessive speed. The horse, in consequence, plunged and fell, and damaged both the carriage and itself. The accident was wholly due to the negligence of the defendants. The plaintiff brought an action in the county court to recover the amount of the depreciation of the horse as well as the damage to the carriage. The judge directed the jury that, as the plaintiff had not been guilty of any negligence, and was, consequently, under no liability to the owners of the horse, he was not entitled to recover for the injury to the horse, and judgment was accordingly entered for the damage to the carriage only. The plaintiff appealed.

Hugh Mitchell, for the plaintiff. The plaintiff, being in possession of the horse, was entitled to recover from the defendants, who were wrongdoers, the full amount of the depreciation. A person who wrongfully does an injury to a chattel is estopped from alleging that the party in possession of the chattel at the time of the injury done was not the true owner; for possession is a good title as against a wrongdoer: *Jeffries* v. *Great Western Ry. Co.* (1) Here the action was, no doubt, an action on the case;

(1) 5 E. & B. 802.

but no distinction is to be drawn in this respect between such an action and an action of trespass or trover. "Case is a possessory action": per Bayley, J., *Rooth* v. *Wilson* (1). In *Croft* v. *Alison* (2), which was an action on the case, the hirers of a carriage for the day were held to be the owners as against the defendant, who was a wrongdoer. No doubt the bailor may sue as well as the bailee, and "whichever first obtains damages it is a full satisfaction": per Parke, B., *Nicholls* v. *Bastard*. (3) And it is conceded that the bailee cannot retain for his own benefit such portion of the damages recovered as is in excess of his own loss. There are several cases which establish that as regards such excess he becomes trustee for the bailor. In *Rooth* v. *Wilson* (4) Lord Ellenborough indeed rested the right of the bailee to recover the full value of a chattel upon the ground of his liability over to his bailor; but all the other judges went upon the ground of his mere possession.

Disturnal, for the defendants, was not called upon.

HAWKINS, J. I am of opinion that this appeal must be dismissed. The appeal is with reference to the measure of the damages recoverable by the plaintiff for an injury to a horse and carriage caused by the negligence of the defendants. The carriage was the property of the plaintiff; the horse was only in the possession of the plaintiff as bailee. The judge entered judgment for the plaintiff for the damage to the carriage, but held that he could not recover for the injury to the horse. The question is whether he was right in so holding. Now, it seems perfectly clear that the plaintiff was under no liability to his bailor for the damage to the horse, for he was not an insurer and he had not been guilty of any negligence. But it has been contended that, notwithstanding that he was under no such liability, he is nevertheless entitled to recover the amount of the depreciation because he was in possession of the horse at the time of the accident, though it is admitted that having recovered such damages he would hold them as trustee for the bailor. I cannot accede to that view. It is true that if a man is in possession

(1) 1 B. & A. at p. 62.
(2) 4 B. & A. 590.
(3) 2 C. M. & R. at p. 660.
(4) 1 B. & A. 59.

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Hawkins, J.

of a chattel, and his possession is interfered with, he may maintain an action, but only for the injury sustained by himself. The right to bring an action against the wrongdoer is one thing; the measure of the damages recoverable in such action is another. And here the plaintiff has suffered no loss at all. It was contended that though either the bailee or the bailor might sue, only one action could be brought, and that if the bailee recovered first the bailor's right of action was barred, and the remedy of the bailor in such case was against his bailee as for money had and received to his use. I do not agree with that contention. If both the bailee and the bailor have suffered damage by the wrongful act of a third party, I think that each may bring a separate action for the loss sustained by himself. I cannot understand why a bailee should be allowed to recover damages beyond the extent of his own loss simply because he happened to be in possession.

WILLS, J. It has been contended that because the plaintiff was bailee of a horse to which an injury was done, while in his possession, by a third person, he is entitled to recover from the wrongdoer the amount of the depreciation of the horse, notwithstanding that the injury was inflicted under circumstances which imposed no liability upon the plaintiff as towards his bailor. The mere statement of that proposition is enough to shew that it cannot be true.

There are many cases, no doubt, where a bailee in possession of a chattel has recovered, against a stranger wrongfully taking it out of his possession or destroying it, the full value. This might well be the case if the bailee was liable over to the bailor, or if no one but the bailee were in a position to sue.

The cases that have been cited relate only to the right of a bailee to maintain an action; they have nothing to do with the measure of damages recoverable in such action. A physical interference with possession is a wrong for which undoubtedly a bailee may sue; but it is quite another thing to say that he may recover in such action the same damages as if he were the owner. It has been argued that the bailee may recover as trustee for the bailor; but for that proposition there is no

authority: it is wholly repugnant to good sense; and there is certainly no case in which a bailee has recovered damages under such circumstances and been made to account for an unascertained portion of them to his bailor. It has been suggested that the bailor can have no action for damage done to his chattel whilst in the possession of the bailee by the negligence of a third person. It is said such an action must have been in old times an action on the case, and Bayley, J., is cited as having said, in *Rooth* v. *Wilson* (1), that case is a possessory action. Case, undoubtedly, did lie in many instances in which the plaintiff was in possession of the chattel, the subject of the action; indeed, it was generally so applied where the circumstances which gave rise to the action were not appropriately to be dealt with in trespass or trover. In that sense it was a possessory action. But it certainly was not confined to instances in which the plaintiff was in possession of the chattels injured, and in 2 Chitty on Pleading, p. 580, a form will be found of a declaration in an action in case by a person who had let goods on hire to a third person for injury done to them whilst in the possession of the hirer by the negligence of the defendant. The decision of the county court judge must, therefore, be affirmed.

Appeal dismissed; leave to appeal refused.

Solicitor for plaintiff: *L. Stanley, Walsall.*

Solicitors for defendants: *Smiles & Co., for Duignan & Elliot, Walsall.*

(1) 1 B. & A. at p. 62.

J. F. C.

1892

Feb. 3, 4.

THE QUEEN *v.* THOMAS AND OTHERS, LICENSING JUSTICES OF BRISTOL.

Licensing Acts—Licence—Beerhouse licensed on May 1, 1869—*Application for Renewal—Refusal—Justices bound to state Grounds—Mandamus to hear and determine—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19.

When justices refuse an application for the licence of a beerhouse which was licensed on May 1, 1869, and has been continuously so licensed, they are bound to state their grounds at the time of refusing the application, and, if they do not so state them, a mandamus will be granted commanding them to hear and determine the application.

Reg. v. *Smith* (Law Rep. 8 Q. B. 146) distinguished.

RULE nisi for a mandamus to the licensing justices of Bristol directing them to hear and determine the application of Eliza Jane Kelland for the renewal of the licence of a beerhouse.

The beerhouse, known as the Crabbs Well, in the city of Bristol, was licensed for the sale by retail of beer to be consumed on or off the premises prior to, and had been continuously so licensed from, the 1st day of May, 1869, until October 10, 1891. At the annual licensing meeting, on August 26, 1891, the application of Mary Ann Osborne, the then holder of the licence, for the renewal of her licence was refused upon the grounds, among others, that the premises were of a disorderly character and frequented by persons of bad character. Notices of appeal were duly given against such refusal; but the appeal was abandoned before September 23.

At the adjourned annual licensing meeting, held on September 23, Eliza Jane Kelland applied for the renewal of the licence to her, alleging that she had entered into an agreement with the owner of the house to take the house from him as his tenant, in succession to Mary Ann Osborne, and that she had entered into possession of the house under that agreement, and become the resident holder and occupier thereof, on September 19, 1891. Upon the hearing of that application Kelland was represented by a solicitor, who addressed the justices, and the evidence of the applicant and of the superintendent of police was heard. It was also announced that the appeal against the

previous refusal was abandoned. The clerk to the justices then said, "Then it is res judicata," and the chairman said, "The application is refused." The observation as to the matter being res judicata referred to the refusal of the application of Mary Ann Osborne upon the ground that the premises were of a disorderly character and frequented by persons of bad character.

In the affidavit of the chairman, made upon shewing cause against the rule, he stated that the justices "further considered, and agreed in finding as facts, that Eliza Jane Kelland had no real interest in the business, but was put forward as a mere nominee of the owner; and that her alleged occupation of the beerhouse was simply colourable. They also considered that the application on her behalf was simply reopening a question that had been already decided; and that, by the abandonment of the appeal, that decision was accepted as final; and lastly, that if the house were reopened it would be a nuisance to the neighbourhood."

Poland, Q.C., and *J. Alderson Foote*, shewed cause. The proper remedy in this case was by appeal to quarter sessions, which would be a full and complete remedy; a writ of mandamus will not, therefore, be granted: *Reg.* v. *Smith.* (1)

The justices decided not to renew this licence upon grounds which they stated, namely, that they had already decided that a licence should not be granted in respect of this house a short time before. That might be a bad ground of refusal, but that was a matter for appeal to quarter sessions. That an appeal lies in such a case as this appears from the cases of *Tranter* v. *Justices of Lancashire* (2); *Reg.* v. *Ashton-under-Lyne* (3); *Reg.* v. *Morison* (4); *Whiffen* v. *Bligh.* (5)

In cases where the justices do not state the grounds of their decision, a mandamus will be granted only if there is no appeal. In all the cases in which a mandamus was granted, there was no right of appeal: *Reg.* v. *Sykes* (6); *Ex parte Smith* (7); *Reg.* v.

(1) Law Rep. 8 Q. B. 146.
(2) 51 J. P. 454.
(3) 37 J. P. 85.
(4) 55 J. P. 87.
(5) 55 J. P. 424; 65 L. T. (N.S.) 413, affirmed by the Court of Appeal, see *Whiffen* v. *Licensing Justices of Malling* [1892] 1 Q. B. 362.
(6) 1 Q. B. D. 52.
(7) 3 Q. B. D. 374.

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Justices of Cumberland (1); except in the case of *Tranter* v. *Justices of Lancashire* (2), in which an appeal was in fact made to quarter sessions.

It appears from the case of *Reg.* v. *Powell* (3), that a person in the position of this applicant can apply at the adjourned annual licensing meeting for a renewal of the licence held by the previous tenant. This applicant did so apply, and all the evidence which she tendered was received, and her advocate was heard. The bad character of the house had been previously proved before these justices. On that ground they refused the application, whether rightly or wrongly. They therefore fully heard and determined this application, and a mandamus ought not to issue.

J. Paterson, in support of the rule. The justices did refuse to hear this application; they said, in effect, that they had already heard and determined the application of Osborne, and decided that the house was of bad character, and that, therefore, that question was concluded, and was a good ground for refusing Kelland's application. That was really a refusal to hear and determine the second application: *Reg.* v. *Justices of Upper Goldcross.* (4)

Upon an application for the renewal of a licence, which comes under the provisions of s. 8 of the Act of 1869, the justices must always state upon which of the grounds specified in that section they refuse the application; if they omit to do so, they do not properly hear and determine: *Reg.* v. *Sykes* (5); *Ex parte Smith* (6); *Tranter* v. *Justices of Lancashire* (2); *Reg* v. *Justices of Cumberland.* (1) Here the justices did not state the grounds of their decision under s. 8.

HAWKINS, J. We are of opinion that this rule ought to be made absolute, and upon a short and simple ground, though many points have been raised. Giving all credit to the chairman of the justices in respect of his statement that the justices agreed in finding as facts that Kelland had no real interest in

(1) 8 Q. B. D. 369.
(2) 51 J. P. 454.
(3) [1891] 2 Q. B. 693.
(4) 62 L. T. (N.S.) 112.
(5) 1 Q. B. D. 52.
(6) 3 Q. B. D. 374.

the business, but was put forward as a mere nominee of the brewer, and that her alleged occupation of the beerhouse was merely colourable, we think that there was no proper adjudication upon her application. This was an application for a licence to sell beer to be consumed on the premises, and the application was based upon the ground that this beerhouse had been licensed at a date prior to May 1, 1869, and had been continuously licensed ever since, and was, therefore, within the provisions of s. 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), which gives special privileges to such houses in respect of the renewal of licences. In reference to such applications, s. 8 of the Act enacts that an application for such a licence as this may be refused only upon one of the four grounds which are there enumerated. This licence, therefore, could only be refused upon one of those four grounds. This section further provides that where an application for such a licence is refused "on the ground that the house in respect of which the applicant applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision." Now, it is not contended on behalf of the justices that the fact that the licence was refused upon the ground of want of qualification was ever announced to the applicant at all. We think that, before any one can be affected by the judgment of a Court, the judgment ought to be announced in court, and that an application for a licence ought not to be refused, under circumstances such as these, except with a statement of the grounds of the refusal. It is not enough for the justices to say now that they decided upon certain grounds if they did not so inform the applicant when refusing the application. The justices, in effect, say that they arrived at their conclusion in private and did not inform the applicant of the grounds of their decision.

It has been argued that this matter is only the subject of an appeal to quarter sessions. It is quite possible that there might have been good grounds for an appeal if the grounds of the decision had been announced to the applicant, and in that case a mandamus would not be granted, for there would be an adequate remedy by appeal. That rule, however, as to the grant of a mandamus is not inflexible, or applicable in cases of this

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kind, where a person does not know the grounds of the decision against him and how to shape his appeal. Here there were four grounds upon which the licence might have been refused, and the applicant would properly want to know upon which of those grounds the refusal was based. All that was said, in fact, was, "Licence refused." The applicant was entitled to know the grounds of that refusal. We think that the circumstances of this case make it very different from the case of *Reg.* v. *Smith* (1), because here the justices determined in their own minds the grounds of their refusal, and did not announce them to the applicant. This matter must go back to be heard and determined according to law upon the consideration of the whole case.

WILLS, J. I am of the same opinion. I think that the fair inference from the affidavits is that the justices decided against the applicant upon the second and fourth grounds specified in s. 8 of the Act of 1869. When justices act upon any of those grounds they must state that they do so, and they must specify upon which of them they do act. Here they have not done so, but have given their decision in an irregular manner, which is so irregular that the whole case ought to be heard again upon every point. The case of *Reg.* v. *Sykes* (2) clearly shews that, in such a case as this, an adjudication without specifying the grounds thereof is so defective that primâ facie the matter ought to be sent back to the justices for them to perform properly their judicial duties. It has been argued that this case is distinguishable from *Reg.* v. *Sykes* (2), on the ground that in the latter case there was no right of appeal, whereas in the present case there is a right of appeal, and that, therefore, an appeal is the proper and effectual remedy, and a mandamus ought not to be granted. I do not agree that this distinction exists, at any rate so as to apply to the present case, where the applicant would have to appeal without knowing what were the grounds of the decision against her, and would not, therefore, be in the same position upon an appeal as she would have been if the grounds had been stated—under which circumstances the

(1) Law Rep. 8 Q. B. 146. (2) 1 Q. B. D. 52.

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remedy by appeal would not be as satisfactory and effectual as the remedy by mandamus. On that ground, as it seems to me, justice requires that the applicant should not be compelled to appeal instead of having a rehearing of her application. This matter must, therefore, go back to the justices; and, if they decide against the applicant, they must state the grounds of their decision, so that she may know what she has to meet on appeal if she desires to appeal. This rule must be made absolute.

Rule absolute for a mandamus.

Solicitor for the respondents: *H. Phillips, for T. Holmes Gore, Bristol.*

Solicitors for the applicant: *Darley & Cumberland, for Clifton, Carter & Co., Bristol.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.

1892

Feb. 4, 5, 6, 20.

ROYAL AQUARIUM AND SUMMER AND WINTER GARDEN SOCIETY, LIMITED *v.* PARKINSON.

Defamation—Slander—County Council—Licensing Meeting—Immunity from Action — Privileged Occasion — Notice of Action—"Anything done"— 11 *&* 12 *Vict. c.* 44, *ss.* 8, 9; *Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 3, 28, 78.

A meeting of the London County Council for granting music and dancing licences under 25 Geo. 2, c. 36, s. 2, is not a Court within the meaning of the rule by which defamatory statements made in the course of proceedings before a Court are absolutely privileged. Therefore, a county councillor making a defamatory statement at such a meeting with regard to a person applying for a licence is not entitled to absolute immunity from an action in respect of such statement. He is only entitled to the ordinary privilege which applies to a communication made without express malice on a privileged occasion.

Notice of action is not necessary in the case of an action against a county councillor for a defamatory statement so made.

By Lord Esher, M.R., and Lopes, L.J.: In an action for slander, where the occasion is privileged, the defence of privilege may be rebutted by shewing that, from some indirect motive, such as anger or gross and unreasoning prejudice with regard to a particular subject-matter, the defendant stated what he did not know to be true, reckless whether it was true or false.

APPLICATION by the defendant for judgment, or in the alternative for a new trial on the ground of misdirection and that the verdict was against the weight of the evidence.

P

C. A.
1892

ROYAL AQUARIUM AND SUMMER AND WINTER GARDEN SOCIETY v. PARKINSON.

The facts at the trial before Hawkins, J., with a jury, appeared to be as follows: The action was brought by the plaintiffs, who were the proprietors of a place of entertainment called the Royal Aquarium, against the defendant, a member of the London County Council, for a slander upon them in the way of their business. The statements complained of were made by the defendant at a meeting of the council, held for the purpose of considering applications under 25 Geo. 2, c. 36, s. 2, for licences for music and dancing, while the defendant was opposing the renewal of the plaintiffs' licence, which, however, was ultimately granted by the council. They were to the following effect: "I spent about half-an-hour at the Aquarium a few months ago, and during the time I was there there was a performance going on upon the stage of the Aquarium of some Japanese figures. They were not living figures, but exceedingly large automata, and the talk was provided of course by some one who was invisible. These two figures, a male and female Japanese, were chasing a butterfly round the stage, and they came to a point where the female figure sat down, and said, 'I have got it.' The male figure standing in front said, 'Where?' And then I state there was the most indecent action of the female figure that you could possibly imagine. Now, I say that that is just as bad as though the figures were living. It was done on the stage in the afternoon, when we are told that it is so respectable that we are to take our families there. I say that that was an indecent action. I will tell any gentleman privately exactly what it was; but so it was, and I consider that that is an indecent performance." There was no plea of justification pleaded by the defendant; but the defence set up was that the occasion on which the words were spoken was absolutely privileged, or, if it was not absolutely privileged, that there was a privilege in the absence of express malice, and also that the defendant was entitled to notice of action by reason of the combined effect of the Local Government Act, 1888, and 11 & 12 Vict. c. 44, and no such notice had been given.

Evidence was given for the plaintiffs as to the perfectly innocent nature of the performance to which the defendant had referred, and the figures used were produced in Court, when it

appeared that they did not represent a male and female, as the defendant had stated, but two males dressed as a clown and a pantaloon. The defendant stated in cross-examination that he only went once to the Aquarium; that he went on the look-out to see if there were any bad characters there; that he could not speak as to part of the dress of the supposed female figure as he was so far away that he could not see; that he disapproved of music halls and such places as the Aquarium; and that his object was to prevent the licence from being granted. (1)

The learned judge left the question whether the statement complained of had been made with express malice to the jury, directing them, in substance, that, if the statement was honestly made in full belief that the whole of it was true, then upon the evidence there would be no express malice proved in the case; but, if they thought that it was not honestly made, but was made with knowledge that it was altogether false or was exaggerated, with a view to depriving the plaintiffs of the licence they were seeking, there would be evidence upon which they might find express malice. The jury found a verdict for the plaintiffs for 250*l.*, and the learned judge subsequently gave judgment for them for that amount. (2)

(1) It has not been thought material to the questions of law on which this case is reported to set out all the evidence, which was very lengthy, with relation to the performance in question and the action taken by the defendant in the matter. The grounds on which the Court of Appeal were of opinion that there was evidence of express malice for the jury for the purposes of this report sufficiently appear from the judgments.

(2) The Local Government Act, 1888 (51 & 52 Vict. c. 41), provides:—

Sect. 3: "There shall be transferred to the council of each county on and after the appointed day, the administrative business of the justices of the county in quarter sessions assembled, that is to say, all business done by the quarter sessions or any committee appointed by the quarter sessions, in respect of the several matters following, namely"—(inter alia)

(v.) "The licensing under any general Act of houses and other places for music or for dancing, and the granting of licences under the Racecourses Licensing Act, 1879."

Sect. 28: (1.) "The county council shall, as respects the business by this Act transferred to them from quarter sessions or the justices out of sessions, be subject to the provisions and limitations in this Act specified, but, save as aforesaid, shall have and be subject to all the powers, duties, and liabilities which the quarter sessions, or any committee thereof, or any justice or justices had or were subject to in respect of the business so transferred."

(2.) "The county council shall,

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with the exceptions hereinafter mentioned, have power to delegate, with or without any restrictions or conditions, as they may think fit, any powers or duties transferred to them by or in pursuance of this Act, either to any committee of the county council appointed in pursuance of this Act, or to any district council in this Act mentioned; the county council may also, without prejudice to any other power, whether to appoint committees or otherwise, delegate to the justices of the county sitting in petty sessions any power or duty transferred by this Act to the county council in respect of the licensing of houses or places for the public performance of stage plays, and in respect of the execution as local authority of the Explosives Act, 1875, or of the Act relating to contagious diseases of animals.

(3.) "Provided that the county council shall not under this section delegate any power of raising money by rate or loan."

Sect. 78: "All enactments in any Act, whether general or local and personal, relating to any business, powers, duties, or liabilities transferred by or in pursuance of this Act from any authority to a county council, either alone or jointly with the quarter sessions, or to any joint committee, shall, subject to the provisions of this Act, and so far as circumstances admit, be construed as if—

(*a.*) "Any reference therein to the said authority, or to any committee or member thereof, or to any meeting thereof (so far as it relates to the business, powers, duties, or liabilities transferred) referred to the county council or to a committee or member thereof, or to a meeting thereof, as the case requires, and as if—

(*b.*) "A reference to any clerk or officer of such authority referred to the clerk or officer of a county council or committee thereof, as the case requires,

"And all the said enactments shall be construed with such modifications as may be necessary for carrying this Act into effect."

(2.) "Provided that the transfer of powers and duties enacted by this Act shall not authorize any county council or any committee or member thereof—

(*a.*) "to exercise any of the powers of a court of record; or

(*b.*) "to administer an oath; or

(*c.*) "to exercise any jurisdiction under the Summary Jurisdiction Acts, or perform any judicial business, or otherwise act as justices or a justice of the peace;

"but this enactment shall be without prejudice to the position of the chairman of the county council as justice of the peace during his term of office."

Sect. 100: "The expression 'powers' includes rights, jurisdiction, capacities, privileges, and immunities."

Feb. 4, 5, 6. *Sir H. James, Q.C.*, and *Murphy, Q.C.* (*R. M. Bray*, with them), for the defendant. The defendant is entitled to absolute immunity from an action in respect of anything said by him while performing his duty as a member of the county council at a meeting for considering applications for licences.

It was his duty to give reasons for the vote he was about to give against the licence, and to state to the council his views on the matter. It is a general principle that any one acting in a judicial capacity is entitled to immunity from an action for defamation for anything said while he is so acting: *Scott* v. *Stansfield.* (1) In the case of a court of justice, a judge, counsel, or witness cannot be sued in respect of statements made in the course of proceedings: *Seaman* v. *Netherclift.* (2) The application of this principle has not been confined to courts of justice strictly so called. It applies to all tribunals which have to act judicially. In *Dawkins* v. *Lord Rokeby* (3) it was applied to a military court of inquiry; in *Thomas* v. *Churton* (4) to a coroner's court. By s. 3 of the Local Government Act, 1888, the functions exercised by the magistrates at quarter sessions in granting licences for music and dancing under 25 Geo. 2, c. 36, s. 2, were transferred to the county council. It is submitted that these functions were in their nature judicial, and that a magistrate could not have been sued for anything said by him at quarter sessions while exercising them: *Rex* v. *Skinner* (5); *Munster* v. *Lamb.* (6) By s. 28 of the Local Government Act, 1888, the county council in respect of business transferred to them from the magistrates are to have all the powers, duties, and liabilities which the magistrates had or were subject to, and by s. 100 the expression "powers" includes privileges and immunities. The fact that the legislature has called the business of granting these licences "administrative" in s. 3 does not prevent its being "judicial" for this purpose, if its nature is such as to bring it within the principles enunciated in *Dawkins* v. *Lord Rokeby.* (3) The distinction taken between "judicial" and "administrative" business in the Act is for the purpose of defining what is to be transferred to the county council and what left to the magistrates: it has no relation to the question now under discussion. The basis of the doctrine of immunity in such cases is public policy. It would be contrary to public policy

(1) Law Rep. 3 Ex. 220.
(2) 2 C. P. D. 53.
(3) Law Rep. 8 Q. B. 255; Law Rep. 7 H. L. 744.
(4) 2 B. & S. 475.
(5) Lofft. 55.
(6) 11 Q. B. D. 588.

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that persons called on to exercise public functions in their nature judicial, such as this is, should be liable to an action and to the risk of a jury's finding express malice; because that liability would tend to affect them in the exercise of those functions which, in the interest of the public, they ought to exercise without fear. The recent decision in *Reg.* v. *London County Council, Ex parte Akkersdyk* (1) shews that the functions of a county councillor in this respect are judicial.

Secondly, the defendant was entitled to notice of action under 11 & 12 Vict. c. 44, s. 9. That statute makes notice of action necessary in every case of an action against a justice "for anything done by him in the execution of his office." The words are very wide, and cover any act or thing done by him while acting as a justice, even although done maliciously. The only question in such cases is whether the cause of action arose while the defendant was acting in his office: *Kirby* v. *Simpson.* (2) The members of a county council are entitled to the same privileges in this respect as the justices had by virtue of the 28th and 78th sections of the Local Government Act, 1888.

Thirdly, the occasion on which the statements complained of were made was clearly privileged; and there was no evidence of express malice. It may be admitted that in some cases the mere fact of a man's having made a charge which turns out to be untrue is some evidence of actual malice—that is, where the charge involves matters of fact, as in the case of a charge of theft for which there is absolutely no foundation. The same reasoning does not apply to matters of opinion, such as that a particular performance was indecent. It is impossible in such a case to say that the mere fact of a charge being made which a jury thinks untrue is evidence of malice. The case was put on the ground that the defendant stated what he knew to be untrue, and the learned judge left the question whether that was so to the jury. There was no evidence of that for the jury.

[LORD ESHER, M.R. Assuming that to be so, the question for us on this application must be whether, upon a right direction to the jury, there was evidence upon which they were justified in finding express malice. If the defendant, either from enthusiasm,

(1) [1892] 1 Q. B. 190. (2) 10 Ex. 358.

or anger, or prejudice, made statements, reckless whether what he said was true or not, would not that be malice?

LOPES, L.J., referred to *Clark* v. *Molyneux*. (1)]

It is submitted that in this case the matter was one merely of opinion, and there was nothing to shew that the defendant was not honestly of opinion that the performance was indecent.

Lockwood, Q.C., and *H. F. Dickens*, for the plaintiffs. In all the cases decided before *Dawkins* v. *Lord Rokeby* (2), the absolute immunity from liability for slanderous statements, even if made maliciously, which the defendant claims, was confined to Courts of justice. The argument for the defendant amounts in effect to this, that the immunity is now to be extended to any person who is engaged in conducting an inquiry in which he has to exercise a discretion which may be called judicial. But the real ground of the decision in *Dawkins* v. *Lord Rokeby* (2) was, that the body—a military court of inquiry—which was exercising the discretion had been in fact constituted a Court. It was not a decision that the mere fact that they had to investigate and report made them a judicial body. There was no extension of the principle previously established; the decision was that the case came within the principle because of the constitution of the court under the Queen's Regulations. That decision does not govern the present case, for there is nothing in the Local Government Act which makes a county council a Court in fact, the power conferred on them being merely a power to inquire. *Labouchere* v. *Earl of Wharncliffe* (3) was a decision that a member of a club could not be expelled on the ground of misconduct without a full inquiry.

[LORD ESHER, M.R. In that case Jessel, M.R., was construing a contract.]

He applied general principles to the construction of the contract, and he said that the inquiry must be conducted judicially, and yet it is clear that the committee of the club were not a Court. The inquiry by a county council is judicial only in the sense in which the inquiry by the committee of the club in *Labouchere* v. *Earl of Wharncliffe* (3) was judicial. There the

(1) 3 Q. B. D. 237. (2) Law Rep. 7 H. L. 744.
(3) 13 Ch. D. 346.

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duty arose out of a contract; but it is immaterial how it arises. "Judicial" implies the exercise of judgment and reason; it does not necessarily imply that the person who has to exercise the discretion is a judge. *Munster* v. *Lamb* (1), a later case than *Dawkins* v. *Lord Rokeby* (2), which is there commented on, shews that the absolute immunity is limited to a judicial inquiry before a judicial tribunal. *Purcell* v. *Sowler* (3) was a decision that the publication in a newspaper of a report of proceedings at a meeting of poor law guardians, at which ex parte charges of misconduct were made against a medical officer, was not privileged by the occasion. There the guardians were transacting business under their statutory powers just as a county council does.

[LORD ESHER, M.R. The ground of the decision was that privilege of newspapers is confined to Courts of justice administering the law.]

Usill v. *Hales* (4) only shews that the privilege of a newspaper extends to a report of ex parte proceedings before a Court.

The effect of the Local Government Act, 1888, is to transfer to a county council only the administrative business of the justices of the county, and no part of the judicial business is transferred. The two kinds of business are carefully distinguished, and the licensing of houses for music or dancing is expressly mentioned as part of the administrative business which is transferred: ss. 3, 28, 78. The county council have nothing to do with anything which is in any technical sense judicial. Whatever privileges are conferred on them by sect. 28 are only conferred with reference to the functions which are transferred to them, and s. 78 shews clearly that they are not to exercise any judicial functions. There is nothing in the Act which constitutes them a Court or gives them any of the qualities of a Court. There is nothing "judicial" in the granting of licences, except that reason and judgment must be exercised, and those qualities must be equally exercised in the other matters which are transferred to a county council. Even if, before the Act, the justices were a Court in dealing with this licensing business, the

(1) 11 Q. B. D. 588.
(2) Law Rep. 7 H. L. 744.
(3) 1 C. P. D. 781; 2 C. P. D. 215.
(4) 3 C. P. D. 319.

Act does not extend the immunity of a Court to the county council. But in truth the immunity of the justices arose only from the fact that they were exercising judicial functions, and it did not protect them in the exercise of merely administrative functions.

The recent decision of the Queen's Bench Division in *Reg.* v. *London County Council, Ex parte Akkersdyk* (1) does not apply to the present case. The point decided there was only this: that members of a county council who have a statutory duty imposed on them cannot discharge that duty properly if they retain counsel to appear for them with the view of influencing the votes of other members. In other words, they cannot take sides upon a matter which they have to decide; they cannot advocate one set of views instead of exercising their discretion; they cannot act both as judges and as accusers. The Court spoke of them as "judges" only in the sense that they were discharging statutory duties, and not as meaning that they were in the position of a Court. In that sense the word would be equally applicable to a board of guardians when discharging their statutory duties. If the principle is extended beyond a tribunal recognised by law, to which only it was extended in *Dawkins* v. *Lord Rokeby* (2), it will be difficult to know where to draw the line. The judgment of Cotton, L.J., in *Leeson* v. *General Council of Medical Education and Registration* (3), did not mean that the members of the medical council were acting as "judges" in the technical sense of the word.

There is no contradiction in saying that administrative duties must be discharged judicially. In this matter the county council were acting, not judicially, but administratively, though they might be expected to bring to the discharge of their duties many of the qualifications of a judge.

Under the Act 25 Geo. 2, c. 36, the justices in granting licences did not act as a Court. They could hear the application in private. Their jurisdiction resembled that of the Lord Chamberlain over theatres.

(1) [1892] 1 Q. B. 190. (2) Law Rep. 8 Q. B. 255; Law Rep. 7 H. L. 744.
(3) 43 Ch. D. 366.

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[They were stopped on the question whether there was evidence of express malice for the jury.]

With regard to the question as to notice of action, a defamatory statement made by a justice in the course of administrative business would not be "anything done in the execution of his office," within the meaning of 11 & 12 Vict. c. 44, s. 8. The section refers to convictions, orders, and other positive acts done by a justice. Mere words spoken are not "anything done" within the section. There is no case in which notice of action has been held to be requisite in an action of slander. The protection given only applies to things done by a justice in a judicial capacity, not to administrative matters.

Sir H. James, Q.C., in reply. The decision in *Purcell* v. *Sowler* (1) was that the publication in a newspaper of the proceedings before a board of guardians was not privileged; it had nothing to do with the immunity of a guardian himself when acting in the discharge of his duties. It related only to the ordinary common law privilege, and not to the immunity of persons discharging a statutory duty. The ground of the interference of the Court by injunction with the action of a club, or a committee of a club, in expelling a member, is the existence of a right of property in the member, and this is shewn by the distinction between the case of an ordinary club, where the members have an interest in the property of the club, and what is called a proprietary club. This was distinctly laid down by Jessel, M.R., in *Rigby* v. *Connol* (2), and the same distinction was recognised by Stirling, J., in *Baird* v. *Wells* (3). In *Labouchere* v. *Earl of Wharncliffe* (4) the club was not a proprietary one. The Court had to decide whether the contract with the member had been performed; but there was no question about judicial duty. In *Dawkins* v. *Lord Rokeby* (5) the court of inquiry could not exercise any of the powers of a Court of record, or do any of those things which by s. 78 of the Local Government Act a county council is prohibited from doing; and yet the defendant, who made statements before that court, was

(1) 1 C. P. D. 781; 2 C. P. D. 215.
(2) 14 Ch. D. 482.
(3) 44 Ch. D. 661.
(4) 13 Ch. D. 346.
(5) Law Rep. 8 Q. B. 255; Law Rep. 7 H. L. 744.

held to be entitled to the same absolute immunity as a witness in a Court of justice. That court of inquiry was a tribunal, but not a Court in the ordinary and strict sense of the word. The question now raised was really raised in *Reg.* v. *London County Council, Ex parte Akkersdyk* (1), and the Court cannot now decide against the defendant without in effect overruling that decision. If there is no immunity for the members of the county council there will be none for the persons who are examined as witnesses before them. In *Dawkins* v. *Lord Rokeby* (2) the court of inquiry had no power to administer an oath. If in s. 3 of the Local Government Act any part of the business formerly transacted by the justices which was really judicial is called administrative, its nature cannot be altered by its being called by a wrong name. If the granting of these licences was judicial business before it was transferred to the county council, it must remain so still, notwithstanding that it is called in the Act "administrative business." The inquiry which the justices had to make before granting these licences was really a judicial inquiry: they could not properly exercise their discretion without hearing any one who could reasonably give them information: Archbold's Quarter Sessions Practice, 4th ed. pp. 537, et seq.

The fact that there are no decisions as to notice of action in an action of slander against a justice for words spoken by him, while acting as such, tends to shew that it has never been supposed that such an action would lie, or that notice of action has been given in such cases if any have arisen.

Cur. adv. vult.

Feb. 20. LORD ESHER, M.R. In this case the action was for a slander upon the plaintiffs in the way of their business, and the jury found a verdict for the plaintiffs for 250*l.* We are now asked to enter judgment for the defendant on several grounds. The statement complained of was made by the defendant at a meeting of the London County Council, of which he is a member, when the question before such meeting was whether a licence for music and dancing should be granted to the plaintiffs. He expressed a very strong opinion that it should not be granted,

(1) [1892] 1 Q. B. 190. (2) Law Rep. 8 Q. B. 255; Law Rep. 7 H. L. 744.

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and in expressing such opinion he used very strong language. He said, in effect, that he had been to the Aquarium and had seen there an indecent performance—a performance which was the most indecent that could be imagined. He described it as a performance between two figures dressed as a male and a female. Even if it had been so, to call the performance described the most indecent that could be imagined seems to me nonsense. But it turned out that the figures were not dressed as a male and female, but as two males, so that all this story of gross indecency was nothing but the defendant's own imagination. The jury appear in effect to have found that he stated what he knew to be untrue. The question for us on this appeal is whether, upon the evidence, the case for the plaintiffs can be supported.

It was argued, in the first place, on behalf of the defendant, that he was exercising a judicial function when he spoke the words complained of, and therefore was entitled to absolute immunity in respect of anything he said. It is true that, in respect of statements made in the course of proceedings before a Court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. In the case of *Dawkins* v. *Lord Rokeby* (1) the doctrine was extended to a military Court of inquiry. It was so extended on the ground that the case was one of an authorized inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a Court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to Courts of justice and tribunals acting in a manner similar to that in which such Courts act. Then can it be said that a meeting of the county council, when engaged in considering applications for licences for music and dancing, is such a tribunal? It is difficult to say who are to be considered as judges acting judicially in such a case. The manner in which the business of such a

(1) Law Rep. 8 Q. B. 255; Law Rep. 7 H. L. 744.

meeting is conducted does not appear to present any analogy to a judicial inquiry. Again, there is another consideration. It is argued for the plaintiffs that this function of granting licences, which has been transferred from the justices to the county council, is not judicial, but merely administrative. The justices had two distinct and separate duties. They had judicial duties. They had to try criminal cases, and in respect of that duty they would be entitled to the absolute immunity which I have mentioned. They had also administrative duties, one of which was this duty of granting licences, and for the purpose of performing these they held consultations among themselves. In the case of duties properly administrative, such as that of granting licences, their action was consultative, for the purpose of administration, and not judicial. When such duties are transferred to the county council, what they do in respect of them is likewise consultative for the purpose of performing an administrative duty; it is not judicial. That consideration also appears to me to shew clearly that the case does not come within the doctrine of absolute immunity applicable to tribunals similar to Courts of justice.

Then comes the question whether this was a privileged occasion. Where, as in this case, a body of persons are engaged in the performance of the duty imposed upon them, of deciding a matter of public administration, which interests not themselves, but the parties concerned and the public, it seems to me clear that the occasion is privileged. Therefore, though what is said amounts to a slander, it is privileged, provided the person who utters it is acting bonâ fide, in the sense that he is using the privileged occasion for the proper purpose and is not abusing it. It is sometimes said that he must be acting bonâ fide and not maliciously; but I do not think that that way of expressing the rule is quite exhaustive or correct. I think the question is whether he is using the occasion honestly or abusing it. If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion. The jury here appear to have thought that the defendant said what was false knowing it to be false. I cannot agree with that view of the case. If the case depended on a finding to that

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effect, I should be very loth to find it. But there is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held by a jury to have abused the occasion, and in that sense to have spoken maliciously. If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion. Therefore, the question seems to me to be whether there is evidence of such a state of mind on the part of the defendant. It has been said that anger would be such a state of mind; but I think that gross and unreasoning prejudice, not only with regard to particular people, but with regard to a subject-matter in question, would have the same effect. If a person charged with the duty of dealing with other people's rights and interests has allowed his mind to fall into such a state of unreasoning prejudice in regard to the subject-matter that he was reckless whether what he stated was true or false, there would be evidence upon which a jury might say that he abused the occasion. Then is there evidence that the defendant did that here? It does not appear that anybody else took these figures to represent a male and female. Whether the defendant is short-sighted or not I do not know; but I cannot conceive that if he had taken any care he could possibly have made this mistake. The very expressions which he used at the meeting of the council seem to me to shew what his state of mind was. How any man could go to the council meeting and say of this performance that it was the most indecent that could possibly be imagined, I cannot understand. It seems to me that the expressions he used tend to shew that he was not acting simply from consideration of his duty in the matter, but had allowed his mind to get into such a reckless state of prejudice that he was regardless of the interests of other persons, and whether what he was saying was true or false. I think the jury were justified on the evidence in taking that view of his conduct and saying that he had abused the occasion. That being so, there would be what is called malice in the sense which I have explained, and the verdict of the jury was justified.

Then another point was raised, viz., that the defendant was entitled to a month's notice of action under 11 & 12 Vict. c. 44, s. 9. The words used in that Act are "anything done in the execution of his office." The question is whether under that expression the defendant is entitled to notice of an action for "words spoken" as in this case. I did entertain considerable doubt on the subject; but these, or rather, I should say, similar words, have been made the subject of judicial decision in the case of *Umphelby* v. *MacLean* (1), a case decided by Lord Ellenborough, C.J., and Bayley, Abbott, and Holroyd, JJ. There the question was whether the defendants were entitled to notice of action under 43 Geo. 3, c. 99, s. 70, where the words were "for anything done in pursuance of this Act"—words which are equivalent to those now in question. Lord Ellenborough, C.J., said: "From the words of this Act I am clearly of opinion that it does not apply to a case of this description. All the expressions refer to some act done or fact committed. There must be a positive act done; in this case there was neither act done or fact committed." There, it is true, the distinction was between a mere omission and an act done. But the expressions used all shew that there must be some "act done or fact committed." The Chief Justice says that there must be a positive act done. Therefore, although the point was not the same, there is that emphatic interpretation of the meaning of such words. I do not think that "words spoken" are "an act done or fact committed" in the sense intended. We must construe the words before us in the same way. Therefore, the defendant was not entitled to notice of action. For these reasons I think that the application must be dismissed. With regard to the case of *Reg.* v. *London County Council, Ex parte Akkersdyk* (2), I do not in any way differ from the decision in that case. The rule applied in that case may be thus stated: Wherever any person has conferred upon him an authority to decide upon a matter affecting another, which he is bound to exercise fairly and impartially, he must act according to the rules of reason and justice. Therefore, he cannot at the same time act as accuser and judge.

(1) 1 B. & A. 42.

(2) [1892] 1 Q. B. 190.

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FRY, L.J. I am of the same opinion. Several arguments have been adduced to us in support of this application. The argument most forcibly pressed upon us was that the defendant was entitled to absolute immunity from action for anything done by him while performing his duty as a member of the county council, in dealing with applications for licences for music and dancing. I will deal with this point first. I must assume, for that purpose, that the defendant made the defamatory statement complained of falsely and maliciously and with knowledge of its falsity. I will first inquire what the law with regard to immunity is in cases of this description, and then proceed to consider the nature of the duty cast upon the defendant. The largest statement of this immunity is that contained in the judgment of the Exchequer Chamber in *Dawkins* v. *Lord Rokeby* (1), where it is said that "the authorities are clear, uniform, and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law." I accept that proposition with this qualification. I doubt whether the word "tribunal" does not really rather embarrass the matter; because that word has not, like the word "court," an ascertainable meaning in English law. Moreover, the judgment of the Exchequer Chamber appears to me to proceed upon the hypothesis that the word is really equivalent to the word "court," because it proceeds to inquire into the nature of the particular Court there in question, and comes to the conclusion that a military Court of inquiry, "though not a Court of record, nor a Court of law, nor coming within the ordinary definition of a Court of justice, is nevertheless a Court duly and legally constituted and recognised in the articles of war and many Acts of Parliament." I do not desire to attempt any definition of a "court." It is obvious that, according to our law, a court may perform various functions. Parliament is a court. Its duties as a whole are deliberative and legislative: the duties of a part of it only are judicial. It is nevertheless a court. There are many other courts which, though not Courts of justice, are nevertheless

(1) Law Rep. 8 Q. B. 255.

courts according to our law. There are, for instance, courts of investigation, like the coroner's court. In my judgment, therefore, the existence of the immunity claimed does not depend upon the question whether the subject-matter of consideration is a Court of Justice, but whether it is a Court in law. Wherever you find a Court in law, to that the law attaches certain privileges, among which is the immunity in question.

But this argument was used on behalf of the defendant. It was said that the existence of this immunity is based on considerations of public policy, and that, as a matter of public policy, wherever a body has to decide questions, and in so doing has to act judicially, it must be held that there is a judicial proceeding to which this immunity ought to attach. It seems to me that the sense in which the word "judicial" is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterize proceedings in Courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a Court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not. I say that there is ample protection afforded in such cases by the ordinary law of privilege. I find no necessity or propriety in carrying the doctrine so far as this argument requires. It is to be borne in mind that there is a great difference between the constitution of bodies of the kind to which I have referred and most Courts. Courts are, for the most part, controlled and presided over by some person selected as specially qualified for the purpose; and they have generally a fixed and dignified course of procedure, which tends to minimise the risks that might flow from this absolute immunity. These considerations do not apply to bodies such as I

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have mentioned. Furthermore, there is no precedent for extending this immunity to all bodies which are bound to decide matters "judicially," in the sense in which this argument uses the term. One observation I wish to make here, in order to prevent what I have said from being misunderstood. I have spoken of the immunity as applying to "Courts." I do not wish anything I have said to be taken as expressing a doubt that there are matters done by a member of a Court in a judicial capacity as to which, though done in his private room and not in open court, this immunity may exist. No question arises here as to such a case, and I only refer to it to prevent being misunderstood.

The question then arises, whether the county council, when hearing applications for licences, were acting as a Court, and whether the defendant on that occasion was acting as a judge or member of that Court. The character in which the council acted turns, in the first place, on the language of the statute 25 Geo. 2, c. 36. The 2nd section of that Act provides for the granting by the quarter sessions of such licences for dancing and music, &c., as they in their discretion shall think proper. That enactment appears to me to confer on the justices an administrative duty or power. I find in the Act no words prescribing any particular mode of procedure, or requiring them to hear and determine. I find, on the contrary, that certain things subsequent to the granting of the licence are to be done in open court. The licence is to be sealed by the justices in open court, and it is to be read by the clerk of the peace publicly in court. These provisions appear to me to be applicable to a proceeding which may take place in the magistrates' private room, but the result of which is afterwards to be made public in open court. The nature of the discretion given and the language of the Act appear to me to shew that the proceeding is administrative, not judicial. We were pressed with the words "in their discretion," used in the statute. It was argued that these words imported a judicial discretion. But it is not every discretion that is judicial. The magistrates are clothed in many cases with a discretion that is not judicial. The first statute that deals with the county rate (12 Geo. 2, c. 29, s. 1) says that the justices

shall have power to make a rate for such sums or sum of money as they in their discretion shall think fit; but it could not be contended that that discretion is judicial. There is nothing in the section which makes the proceeding that of a Court, though it has to be done discreetly. Then comes the question, whether there is anything in the Local Government Act, 1888, to alter the nature of the proceeding in this respect. I come to the conclusion that there is not. It is clear from the language of the Act that it was intended to draw a broad line between the administrative and judicial functions of the justices, and to transfer the former to the county council, while leaving the latter in the hands of the justices. Sect. 3 provides that there shall be transferred to the county council the administrative business of the justices of the county in quarter sessions assembled—that is to say, all business done by the quarter sessions, or a committee appointed by the quarter sessions, in respect of the several matters following; and these include, by sub-s. 5, the licensing, under any general Act, of houses and other places for music and dancing. But the matter does not rest there. For s. 78, sub-s. 2, shews the intention to have been to exclude from the transfer of the magistrates' duties to the county council all judicial duties. That section provides in sub-s. 2 that the transfer of powers and duties enacted by the Act shall not authorize any county council to exercise any jurisdiction under the Summary Jurisdiction Acts, or to perform any judicial business, or otherwise act as justices or a justice of the peace. The statute, therefore, so far from giving any new colour to the suggestion made on behalf of the defendant, leaves the matter precisely where it was before. I, therefore, come to the conclusion that the body to which the statements complained of were made was not a Court, and that those statements are not entitled to the immunity claimed for them.

Then comes the question as to notice of action. That turns on the language of statute 11 & 12 Vict. c. 44, ss. 8, 9. The words there used are: "No action shall be brought against any justice of the peace for anything done by him in the execution of his office," &c. In my opinion, words spoken are not "anything done" within that language.

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The only remaining question is, whether there was any evidence for the jury of express malice which would prevent the application of privilege. The figures referred to were produced before the jury, and evidence was given of their identity with those of which the defendant spoke. There was evidence as to the dresses they wore and the nature of the performance. That evidence was such as might lead the jury to suppose that the defendant could not have been honestly mistaken as to what he saw. I express no opinion as to whether I should have arrived at the same conclusion as the jury. It seems to me to be sufficient to say that there was evidence for them. Therefore, this application fails on all the grounds which have been put forward.

With regard to *Akkersdyk's Case* (1), that case proceeded on the view that the county council were bound to act judicially in the sense which I have already explained—viz., that they were bound to act fairly and impartially. It is not fair that the same person should act as accuser and also as judge. That case did not decide that the county council was a Court.

LOPES, L.J. This is a most important case, and though agreeing with the able and exhaustive judgment of Hawkins, J., and with those just delivered, I desire to give my reasons for so doing.

The plaintiffs bring their action against the defendant for slanderous words used about them in respect of their business. The defendant says the action is not maintainable on three grounds: first, because the slanderous words are absolutely privileged, he being a member of the county council: secondly, if not absolutely privileged, they are privileged to a qualified extent or sub modo—that is, being uttered on a privileged occasion, they are not actionable unless express malice is proved, and that of such malice there is no evidence: thirdly, that he is entitled to notice of action under 11 & 12 Vict. c. 44, and that no such notice of action has been given. These grounds must be considered separately.

First, with regard to the absolute immunity claimed by way of privilege. Privilege or immunity in respect of defamation is of two kinds—absolute privilege, which is conceded to members of the Houses of Parliament, judges, &c.; and qualified privilege,

(1) [1892] 1 Q. B. 190.

to which every subject of the Queen is entitled provided the occasion on which the defamatory matter is written or spoken is privileged, and there is an absence of express malice. The first seems rather to attach to the person or character of the person writing or speaking the defamatory matter, the second to the occasion when the defamatory matter is written or spoken. The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed. This "absolute privilege" has been conceded on the grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them. It is, however, a privilege which ought not to be extended. It belongs, in my opinion, to Courts recognised by law, and to such Courts only. It was contended that the so confining the absolute privilege was contrary to the decision of *Dawkins* v. *Lord Rokeby*. (1) That contention cannot be supported. The foundation of the decision is that the Court of inquiry in that case was a tribunal constituted, sanctioned, and recognised by law. Kelly, C.B., says: "A Court of inquiry, though not a Court of record, nor a Court of law, nor coming within the ordinary definition of a Court of justice, is nevertheless a Court duly and legally constituted, and recognised in the Articles of War and many Acts of Parliament." *Dawkins* v. *Lord Rokeby* (1), therefore, forms no exception to the general rule which I have stated. The defendant contends that the Local Government Act, 1888, has conferred this absolute privilege upon members of the county council,

(1) Law Rep. 8 Q. B. 255; Law Rep. 7 H. L. 744.

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because there has been transferred to them by that Act certain business of the quarter sessions in respect of which they have judicial duties to perform. The word "judicial" has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in court, and they also act judicially when determining in their private room what is right and fair in some administrative matter brought before them, as, for instance, levying a rate. It becomes, therefore, necessary to consider the Local Government Act, 1888. The material sections are ss. 3, 28, and 78. Sect. 3 transfers to the county council the administrative business of the justices of the county in quarter sessions assembled. It is admitted that all that is transferred by this section is administrative business, business which was transacted out of court by the quarter sessions, except under sub-s. 5 of s. 3—viz., the licensing houses and other places for music and dancing, which is the matter with which we are especially concerned in this case, and with which I will deal later on. Sect. 28 gives to the county council in respect of the business transferred, taking it shortly, and calling in aid the definition of "powers" in s. 100, all the privileges and immunities which the quarter sessions or any committee thereof, or any justice or justices, had in respect of the business transferred. The proviso contained in the second part of s. 78 is material. It runs thus: "Provided that the transfer of powers and duties enacted by this Act shall not authorize any county council, or any committee or member thereof (*a*) to exercise any of the powers of a Court of record; (*b*) to administer an oath; or (*c*) to exercise any jurisdiction under the Summary Jurisdiction Acts, or to perform any judicial business or otherwise act as justices or a justice of the peace." I understand that the legislature intended that all the administrative business of the quarter sessions was to be transferred to the county council, and they were in all respects to be placed in the same position as the justices had previously occupied with

respect to that administrative business, and in respect of it were to enjoy the same privileges and immunities which the justices had previously enjoyed, but they were not to have any jurisdiction to perform any duties which the justices discharged in court. That part of the judicial business of justices of the peace was to remain undisturbed in the justices. If this is a correct view, the County Council did not acquire the absolute privilege now contended for. The justices never had it when discharging administrative duties in their private room. They could only invoke it when administering the law in court. The county council have not that jurisdiction to which only the absolute privilege can attach. But it is said s. 3 of the Local Government Act transferred to the county council the licensing of houses and other places for music or for dancing, under 25 Geo. 2, c. 36, which is not administrative business, but business to be transacted by the justices in court. The Local Government Act deals with it as administrative business, and so calls it, and sub-s. 2 of s. 78 says that the county council are not to perform any judicial business, by which I understand, having regard to the terms of that proviso, any business such as is performed by justices in court. But did the Act of Geo. 2 contemplate any proceeding in court? Was it not rather an application to the justices in their private room that was intended? Sect. 2 says the justices are hereby authorized and empowered to grant such licences as they in their discretion shall think proper, signified under the hands and seals of four justices. Every licence is to be signed and sealed by the justices in open court, and afterwards publicly read by the clerk of the peace, together with the names of the justices subscribing the same. This leads me to the conclusion that the granting the license was not a proceeding in court, and was for that reason published afterwards in open court in the way prescribed. Sect. 4 of the Act 25 Geo. 2 excludes from the operation of the Act certain theatres and licences of the Lord Chamberlain. I believe the jurisdiction to be exercised by the justices under s. 2 was very similar to the jurisdiction exercised by the Lord Chamberlain. Nothing but administrative business, therefore, was transferred to the county council, and the business with regard to licences and dancing forms no exception. The conclusion at which I arrive is that

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the defendant is not entitled to the absolute privilege he claims, and his first ground for impeaching the judgment fails.

The defendant's second ground for impeaching the judgment is that there was no evidence of malice which ought to have been left to the jury. The slanderous words complained of were uttered in the course of a debate with regard to the propriety of granting the plaintiffs a licence for music and dancing. The occasion was privileged, and the learned judge so held. Not only must the occasion create the privilege, but the occasion must be made use of bonâ fide and without malice. The defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose. He is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive. This cast upon the plaintiffs the burden of proving express malice or malice in fact. If it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it not stopping or taking the trouble to ascertain whether it is true or not—stated it recklessly by reason of his anger or other indirect motive—the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive. Applying this principle to this case, I think there was evidence which justified the jury in their finding of malice. The defendant, as he states, "was on the look-out and disapproved of music-halls and theatres"; he was "a long way from the stage and only had an imperfect opportunity of seeing the performance." He was only there once. It was admitted that the indecent action complained of would not be indecent if the figure in question was a male, though it would be indecent if a female. It was proved beyond dispute that the figure in question was a male, and there is a considerable body of evidence which is uncontradicted to shew that no person, viewing the performance with an unprejudiced eye, and using that amount of caution and circumspection which everybody ought to exercise before defaming another, could possibly make a mistake as to its sex. The figures were produced and the jury saw them. I am unable, in such circumstances, to say there was no evidence upon which a jury might

reasonably find that, to say the least, the defendant visited the Aquarium with a mind unduly inclined to mark iniquity, and subsequently stated as true that which he did not know to be true, recklessly, not taking the trouble to ascertain whether it was true or not, and did this by reason of his objection to places of amusement like the Aquarium. If the jury so thought, they were justified in finding malice.

The third and last ground upon which the defendant seeks to impeach the judgment is because no notice of action was given as required by s. 9 of 11 & 12 Vict. c. 44. This is an Act to protect justices from vexatious actions for acts done by them in their duty as justices in respect of any matter within their jurisdiction as justices. The action now under consideration is an action for slanderous words spoken; and, assuming there was no other objection, it seems to me clear that this case is outside the words and spirit of the Act. The protection is in respect of acts done by the justices, and can have no application to defamatory words uttered. The case of *Umphelby* v. *M'Lean* (1) is in point. It was decided on the 43 Geo. 3, c. 99, s. 70, which contained a provision for the protection of the justices similar to that in 11 & 12 Vict. c. 44—viz., "for anything done in pursuance of this Act." Lord Chief Justice Ellenborough says: "From the words of the Act I am clearly of opinion that it does not apply to a case of this description. All the expressions refer to some act done or fact committed. There must be a positive act done." I do not think notice of action was necessary. The judgment for the plaintiffs must, therefore, stand, and this appeal must be dismissed with costs.

With regard to *Akkersdyk's Case* (2), I do not think that the decision in that case has any application to the present. That case proceeded on the principle that no person who is bound to act fairly in respect of a matter can act as an accuser and also as a judge at the same time.

Application dismissed.

Solicitors for plaintiffs: *Munk & Adie.*

Solicitors for defendant: *May, Sykes, & Batten.*

(1) 1 B. & A. 42.

(2) [1892] 1 Q. B. 190.

E. L.

1892
March 3.

LILLY, WILSON & CO. *v.* SMALES, EELES & CO.

Ship — Charterparty — Shipbroker — Warranty of Authority — Instructions by Telegraph — Form of Signature "by Telegraphic Authority" of the Charterer "as Agent."

A firm of shipbrokers signed a charterparty in the form, "by telegraphic authority" of the charterer "as agent." Owing to a mistake made by the officials in its transmission, the rate of freight offered by the charterer had been misrepresented in the telegram which the shipbrokers had received from him:—

Held, by Denman, J., in an action brought by the owners of the ship against the shipbrokers for breach of warranty of authority, that evidence of persons engaged in the business was admissible to explain the effect of the form of signature, that such evidence shewed that it was commonly adopted in order to negative the implication of any further warranty by the agent than that he had received a telegram, which, if correct, authorized such a charter as that which he was signing, and that the shipbrokers were therefore not liable.

CASE tried before Denman, J. The facts and arguments are sufficiently stated in the judgment.

Barnes, Q.C., and *W. A. Meek*, for the plaintiffs.
Robson, Q.C., and *W. H. Clay*, for the defendants.

Cur. adv. vult.

DENMAN, J., delivered the following written judgment. The plaintiffs in this case were owners of the ship *Pocklington*; the defendants, brokers and shipping agents. On April 28, Mr. F. Eeles, as representing the defendants, met Mr. F. Cattle, a representative of the firm of Wood, Cattle & Co., in London, who acted as agents of the plaintiffs, and produced a list of requirements of ships to fulfil several different kinds of engagements. Amongst others was one describing the freight offered as 3*s.* 9*d.* There was a conflict of evidence as to what took place at this interview; but it was arranged that Wood, Cattle & Co. were to have two hours in which to accept or reject the offer. Before the two hours expired the same parties met again; and I find as a fact, though Mr. Cattle's memory was a blank upon the point, that Mr. F. Eeles expressed a doubt as to whether there had not been a mistake as to the rate of freight offered by his principals

in the telegram of which the list produced by him at the earlier interview was a translation. In fact, the rate 3*s.* 9*d.* was mentioned owing to a blunder of the telegraphic officials who transmitted the message. The freight actually offered by Reischer, the defendants' principal, was 3*s.* 4½*d.* The mistake arose from the alteration of a figure "4" into a figure "7" in the cypher number; the figure actually given in by the intending charterer having been a "4," which meant 3*s.* 4½*d.*, and not a "7," which meant 3*s.* 9*d.* The defendants, on receiving the charter signed by "Wood & Co., as agents," returned it signed "by telegraphic authority of Sam Reischer, Smales, Eeles & Co., as agents." It was contended by the plaintiffs that the defendants were liable in the action as having warranted or held themselves out as having an authority which they did not possess. The defendants, on the other hand, relied upon the form in which they had signed as negativing the warranty of authority which would have been implied if they had merely signed "as agents," and as amounting to a representation that they took no such risk upon themselves, but merely warranted that they had such authority as a possibly erroneous telegram might confer.

If the case depended merely upon the construction of such a signature as a matter of law, much is to be said on both sides. On the one hand, it is difficult to understand why such a mode of signing should be used if it left the agent signing under precisely the same liability as he would be under without it. On the other hand, there is force in the argument used by Mr. Barnes for the plaintiffs, that, inasmuch as the shipowner is often half the globe away when charters are made, there would be great inconvenience if in every case it was necessary to verify the correctness of telegrams before a firm contract could be relied on. But I do not think it necessary to consider all the arguments which were used as to the possible meaning of the words here adopted, because I think that it was not a question wholly of legal construction, but that the words adopted were words the true meaning of which was to be ascertained by the evidence of persons engaged in the business of commerce of this nature; and if I am right in this, I have no hesitation in finding that the defendants' witnesses established that this form of

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signing is well understood in the trade as meaning to negative the implication of a warranty by the charterer's agent, at all events, to a greater extent than warranting that he has had a telegram which, if correct, authorizes such a charter as that which he is signing.

It appeared from the evidence of trustworthy witnesses for the defendants, that whenever charters are entered into by brokers in accordance with telegraphic instructions, it is usual to sign in this form with the very object of avoiding the implication of an absolute warranty. I see no reason to doubt that this was the real object of the defendants in signing as they did; and, this being my opinion, I think that there can be no ground for fixing them with a warranty such as they never intended to give, and which would be wholly inconsistent with the general understanding of persons engaged in the business in which they were employed. I therefore give judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Turnbull, Tilly, & Mousir, for Turnbull & Tilly, West Hartlepool.*

Solicitors for defendants: *Paul E. Vanderpump & Eve.*

H. D. W.

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March 1.

[IN THE COURT OF APPEAL.]

DIXON AND OTHERS *v.* SIR HENRY CALCRAFT (SECRETARY OF THE BOARD OF TRADE).

Ship—Provisional Detention of by Board of Trade as Unsafe—Absence of "reasonable and probable cause by reason of the condition of the Ship"—"Compensation for loss or damage sustained by reason of detention"—Damage to reputation of Shipowner—Merchant Shipping Act, 1876 (39 & 40 *Vict. c.* 80), *ss.* 6, *sub-s.* 1, 10.

The Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80) s. 6, sub-s. 1, enacts that the Board of Trade, if they have reason to believe, on complaint or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed: and s. 10 enacts that, if it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs

of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey; and that an action under the section may be brought against the secretary of the Board of Trade.

In an action brought for compensation under s. 10 of the Act, the plaintiffs claimed general damages in respect of injury to their reputation as shipowners by reason of the detention of their ship:—

Held, that such damages were not within the words "compensation for loss or damage" in the section, and therefore were not recoverable.

APPLICATION to enter judgment for the defendant, or for a new trial.

The action was brought by shipowners against the Secretary of the Board of Trade to recover expenses and compensation in respect of the provisional detention of the plaintiffs' ship at Liverpool by the Board of Trade under s. 6, sub-s. 1, of the Merchant Shipping Act, 1876. (1)

At the trial, before Collins, J., with a jury, the facts appeared to be as follows. The ship in question was about to sail with a cargo of salt on a voyage from Liverpool to Calcutta. The disc on the ship's side indicating the maximum load-line was not in the proper place according to new regulations just issued by the authorities under the Merchant Shipping Act, 1890, being too high up; but the ship was not overloaded, not being loaded down to the centre of the disc. The Customs authorities at

(1) 39 & 40 Vict. c. 80, provides as follows:—Sect. 6: "Where a British ship, being in any port of the United Kingdom, is, by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as 'unsafe') may be provisionally detained for the purpose of being surveyed, and either finally detained or released, as follows: (1.) The Board of Trade, if they have reason to believe, on complaint, or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed."

Sect. 10: "If it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship; and also compensation for any loss or damage sustained by him by reason of the detention or survey. . . . An action for any costs or compensation payable by the Board of Trade under this section may be brought against the secretary thereof by his official title, as if he were a corporation sole."

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Liverpool had given her a clearance upon a guarantee that the position of the disc should be altered on her return; but the officials of the Board of Trade in London, being misled by certain telegrams from the officials in Liverpool as to the matter into the belief that the ship was overloaded, ordered her to be provisionally detained. She was released after the lapse of two days. It was admitted by the plaintiffs in the argument that the officials of the Board of Trade in London had reason to believe that the ship was overloaded; and, therefore, their action was justified under sub-s. 1 of s. 6. It was also admitted by the Board of Trade that there was not reasonable and probable cause, by reason of the condition of the ship, or any act or default of the owners, for her detention; and, therefore, the case was within s. 10. The defendant paid into Court the full amount claimed by the plaintiffs for costs of and incidental to the detention and survey of the ship, and pecuniary loss, such as demurrage for the period of detention, extra wages of crew, &c. The plaintiffs, however, also claimed general damages in respect of injury to their reputation as shipowners by the detention of their ship as being overloaded so as to be unsafe. No claim was made for, or evidence given of, any specific pecuniary damage to plaintiffs' business under this head of damage. The learned judge left to the jury the question whether the detention of the ship was an imputation on the plaintiffs' reputation as shipowners, and told them that, if they thought it was, they might give such sum as they might think reasonable as compensation for such injury to reputation. The jury found a verdict for the plaintiffs on this head for 100*l.* damages.

Sir R. E. Webster, *A.G.*, and *Gully*, *Q.C.*, *H. Sutton*, and *T. G. Carver*, with them, for the defendant. "Compensation for loss or damage" under s. 10 is confined to actual pecuniary loss, and does not include damages in the nature of exemplary damages, or solatium for supposed imputations on character. It cannot be supposed that the legislature meant that the Board of Trade should be subject to vindictive damages for a bonâ fide mistake in the exercise of functions which are imposed upon them in the interests of the public. There was absolutely no evidence in this case of any

definite pecuniary damage in respect of the imputation of overloading. If the contention for the plaintiffs is correct, damages of this nature could be recovered in every case of the kind. "Compensation for loss or damage" is not equivalent to "damages": *Smith* v. *Brown*. (1) Therefore the plaintiffs are not entitled to all damages that would be recoverable in an action for a tort. The action is against the defendant, as representing a state department, for an act done in the exercise of their functions under an Act of Parliament in a matter of public interest, viz., for the preservation of life at sea; and on general principles no action can lie against a department so acting except such as is within the terms of the statute. The Act does not make the Board of Trade liable as for a trespass or a tort in s. 10, but only gives a statutory remedy by an action for the pecuniary loss or damage sustained. No damages in the nature of a solatium, or exemplary damages in respect of injury to reputation, can be recovered in such an action. It is impossible to suppose that damages for loss of reputation can be recoverable in respect of a lawful act. If the intention had been that the shipowner should recover general damages as for a tort in cases within the 10th section, the section would have said so. Moreover, assuming that the expression "compensation for loss or damage" is equivalent to "damages," such damages as these could not be recovered in an action for wrongful detention of a ship; and it is absolutely impossible to suppose that the legislature meant to give in respect of a lawful act compensation going beyond the damages that would be recoverable in an action, if the detention were unlawful. [They also cited *Blake* v. *Midland Ry. Co.* (2)]

Bigham, Q.C., and *A. G. Steel*, for the plaintiffs. The whole question is, What is the meaning of s. 10 of the Act? It is not suggested that there is any cause of action outside that section. It is submitted that it was intended by that section to give compensation in the fullest sense of the term to the individual shipowner, who might be injured by the exercise of the extraordinary power given, in the public interest, to the Board of Trade, where it turns out that there was really no ground for its exercise. The term "solatium" is incorrect as applied to

(1) Law Rep. 6 Q. B. 729. (2) 18 Q. B. 93.

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these damages. It is no question of solatium for wounded feelings, or vindictive damages. It is not contended that such could be recovered. The compensation contemplated by the section is compensation for out of pocket loss, and any other loss or damage which, though it be incapable of being put down in definite items, the jury may estimate. The words are the widest that could be used. The contention for the defendant really gives no effect to the word "damage" as distinguished from "loss." It is contended that, at the very least, the words are intended to cover all such damages as might have been recovered if the action of the Board of Trade had been wholly wrongful, and that such damages in the case of a wilful trespass would include general damage to the plaintiffs' credit as shipowners.

Sir R. E. Webster, A.G., did not reply.

LORD ESHER, M.R. The question is whether the defendant, according to the true interpretation of the Act, is liable in respect of the head of damages or compensation which has been the subject of discussion in this case. It appears that, although the Board of Trade acted bonâ fide on the belief that the condition of the ship was unsafe by reason of her being overloaded, it ultimately turned out that there was "no reasonable and probable cause by reason of the condition of the ship" for her detention; and thereupon the plaintiffs claim, in addition to the other damages paid into Court, compensation or damages in respect of the detention of the ship on the suspicion of her being overloaded, as being an imputation upon their character as shipowners. The judge left it to the jury to say whether the detention of the ship under such circumstances was an imputation on them as shipowners, and told them that, if they thought that it was, they might give damages in respect of that, not damages measured by any definite sum proved, but at large. We have to look at the terms of the Act to see whether it entitles the plaintiffs to such a strange kind of damages. It must be observed, in the first place, that the Board of Trade have done nothing but detain the plaintiffs' ship. If that had been done by a private individual, it would have been a tort by wrongful seizure of a chattel. If it were possible in any case to suppose that that

seizure really involved an imputation on the plaintiffs' character, still, for such a seizure of a chattel they could not at common law, and apart from any statute, get damages by reason of injury to their feelings or reputation by such an imputation. Then let us consider the meaning of the Act. The plaintiffs' ship was detained under the provisions of s. 6, sub-s. 1. That section, as it seems to me, imposes a duty on the Board of Trade, or, at any rate, authorizes them, to detain a ship, if they have reason to believe, that is, if they really and honestly believe, that she is unsafe; for it seems to me impossible to measure the amount of reason, upon which they are entitled to act under the words "on complaint, or otherwise." If they honestly believe that there is a suspicion that a ship is unsafe, then on grounds of public policy, having regard to the safety of human life, they are to detain the ship for the purpose of being surveyed. Such a detention is, therefore, no unlawful act, but an act of duty. If they failed to perform that duty, as a great department they would be subject to obloquy and disparagement for not doing their duty. That being so, we must be careful to see how far the legislature meant them to be made liable in respect of the performance of such duty. That depends on the language of s. 10. Sect. 10 does not give compensation or a right of action to the shipowner on the ground that the Board of Trade has done that which was not reasonable for them to do. It assumes that it was reasonable for them to detain the ship, but says that, if it nevertheless turns out that there was not reasonable and probable cause by reason of the condition of the ship, or the act or default of the owner, for the provisional detention of the ship—that is, if it turns out on inquiry that there is no reason why the ship should be detained—then the Board of Trade are to be liable under the Act to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey. The costs are, obviously, definite sums capable of being calculated. Then what is compensation? The expression "compensation" is not ordinarily used as an equivalent for "damages." It is used in such Acts as these in relation to a lawful act which has caused injury. Therefore that word

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would not, I think, include damages at large. Then what is the meaning of "loss or damage"? It is not necessary to say in this case whether "damage" would include something beyond definite pecuniary loss, and would include damages at large. At any rate, I do not think it would include matters which could not be recovered, even if the act done were not authorized by law. Possibly it might include everything which could be recovered from the Board of Trade, if the board were in the position of an ordinary individual not authorized to do the act in question. It is not necessary to determine that. It seems to me clear that it cannot include more. I cannot suppose that, when the legislature imposed this duty on the Board of Trade, it meant to give by way of compensation that which could not be recovered against an individual if the act were wrongful. Let us see, then, whether, if the act done by the Board of Trade were wrongful, the plaintiffs could recover these damages in respect of injury to their reputation by the detention of the ship. That such detention would injure their reputation in the mind of any sensible person I hesitate to believe, but I will assume that it might. The damage alleged is that, by seizing the ship on a suspicion of being unsafe, an imputation was cast on the character of the plaintiffs as shipowners. No such claim for damages was ever yet sustained in an action for seizing a chattel. If compensation were given for such an injury, it would be a kind of compensation unknown to the English law. It seems to me clear that this damage could not be recovered in an action for such a detention of a chattel, if wrongful. It could not be given by way of aggravation of damages in respect of wounded feelings. Such a thing was never heard of. Nor could it be given for injury to character, because that would really be giving damages as for libel or slander, though the matter complained of is not anything written or spoken. Look at the case how you will, such a detention of a ship as this cannot be made the basis of compensation in respect of an imputation on the shipowner's character or injury to his feelings. Therefore, in my opinion, such a head of damages ought not to have been left to the jury. For these reasons I think the application must be allowed, and judgment entered for the defendant.

FRY, L.J. The question which we have to determine is what construction we are to put upon the words "compensation for any loss or damage sustained by him" in the 10th section of the Merchant Shipping Act, 1876. In this case the plaintiffs' ship was detained provisionally under s. 6 of the Act. It is conceded that the Board of Trade were acting under sub-s. 1 of that section, and that they were acting within the power thereby given. We start, therefore, with the fact that the action of the Board of Trade in detaining the ship is admitted to have been lawful. Then we have to inquire what compensation is to be paid by the Board of Trade for doing that lawful act, in the particular event contemplated by the 10th section, viz., where it is made to appear that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship. The question is whether, under the words to which I have alluded, the plaintiffs can recover for injury said to have been caused to their reputation as shipowners by reason of the action of the Board of Trade. I am not going to say that the action of the Board of Trade did not amount to something very like an imputation on the propriety of the plaintiffs' conduct; for it seems to me that it may very well be argued that the power to detain a ship provisionally only arises under circumstances which suggest that the shipowner is probably acting in contravention either of the law or of his moral duty. Nevertheless, I think that compensation cannot be recovered under the Act in respect of such an imputation; because it seems to me impossible in law to say that there can be loss of or damage to reputation sustained by reason of a lawful act. There are many lawful acts which a man may do, and which may cause pain or loss to his neighbours, and yet in law there is no damage sustained by the person affected, and no action will lie. I therefore agree that the plaintiffs were not entitled to recover in respect of this head of compensation.

LOPES, L.J. The question is whether the plaintiffs in this case are entitled to recover compensation for loss of reputation. It is admitted by the plaintiffs that the Board of Trade were

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acting lawfully in provisionally detaining the ship. It is admitted, on the other hand, by the Board of Trade, that it subsequently appeared that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship. The effect of those admissions is that the case is brought within s. 10, and the plaintiffs are entitled to "compensation for any loss or damage sustained by them by reason of the detention or survey." The question is what is the meaning of these words. In my opinion they do not include damage by loss of reputation. I cannot think that any lawyer on reading them could suppose that they did. No such damage is known to the law in the case of a trespass to goods, and here there is no trespass, but a lawful action. That being so, I cannot think that the legislature intended to introduce such a novel principle as that suggested. If they had so intended, I think much more definite language would have been used. Therefore, I come to the conclusion that the plaintiffs are not entitled to recover compensation for loss of reputation, and therefore judgment must be entered for the defendant.

Judgment for defendant.

Solicitors for plaintiffs: *Walker, Son, & Field, for Weightman, Pedder, & Weightman.*

Solicitor for defendant: *Solicitor to the Board of Trade.*

E. L.

[IN THE COURT OF APPEAL.]

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1892
Jan. 16.

CROSS AND OTHERS *v.* FISHER AND OTHERS.

Building Society—Deposits—Excess over Prescribed Limits—Liability of Directors—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 43.

The Building Societies Act, 1874, s. 43, enacts, "If any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess."

A building society was authorized to receive money on deposit up to a certain limit. The course of business authorized by the directors was, that the secretary gave a provisional receipt to the depositor, and then prepared a formal receipt, which was signed by two directors and countersigned by himself. The secretary received moneys on deposit to an amount exceeding the limit of the orrowing powers of the society. He appropriated to his own use a great part of the money deposited, and so managed the books of the society as to keep the directors in ignorance that the limit had been exceeded.

In an action by a depositor against the directors to recover the amount of a deposit made after the limit of the borrowing powers had been reached:—

Held, that every director who was a member of the board when the deposit was received was personally liable for the amount so received.

THIS was an appeal by the defendants against a judgment of Mathew, J., in an action to recover money alleged to have been advanced by way of loan or deposit to the Hull and Holderness Conservative Building Society.

The society was established in 1875, and registered under the Building Societies Act, 1874. The objects of the society were those of an ordinary building society; but it was authorized to receive money on loan or deposit. Rule 7 of the society's rules was as follows: "The board shall have power to borrow such sums of money as shall from time to time be required for the purposes of the society from the bankers of the society, or from any person or persons or bodies corporate, and give receipts for the same; such receipts shall be issued in the name of the society, and shall be signed by two of the directors, and countersigned by the secretary. The interest agreed to be paid shall not in any case exceed 5*l.* per cent. per annum. The whole of the moneys so received on deposit or loan shall not at any time exceed two-thirds of the amount for the time being secured to

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the society by mortgages from its members." By rule 12: "The society shall be governed by a board of directors, not more than fifteen in number, and three trustees, who shall be ex-officio members of the board. Five members of the board shall form a quorum. . . . They shall meet as often as may be necessary, and not less than once a month for transaction of business. . . . The board shall have full power and absolute discretion to direct the affairs of the society, subject only to the rules thereof for the time being." By a resolution of the board of directors, applications with regard to loans or deposits above 50*l.* were to be submitted to the board. The directors inserted advertisements in the local papers, and caused placards to be placed in shops to the effect that they were prepared to receive deposits in sums of 5*l.* and upwards, at 5 per cent. interest, payable quarterly, and that for particulars application should be made to Mr. Robert Collison, secretary. The course of business with regard to loans was that the secretary was furnished with a receipt book, the receipts being in this form: "Received of , on deposit with the Hull and Holderness Conservative Building Society, the sum of , for which an official certificate will be issued." When Collison received money on deposit, he gave a receipt in the above form, and then prepared the official receipt, which ran, "Received of the sum of as a deposit at 5 per cent. per annum interest, payable at one month's notice," and obtained for it the signatures of any two of the directors that he could find, and then countersigned it himself. Collison for many years carried on a system of fraud by inserting on the counterfoils a lesser sum than that inserted in the receipts. The lesser sum was carried into the books, so that from them it did not appear that the borrowing powers had been exceeded. The difference between the amounts Collison retained; and he paid the interest on the larger amounts to the depositors either by his own cheque or in cash, carrying into the books only the amount of interest on the lesser amounts. The aggregate of the amounts deposited by the lenders was largely in excess of the limit of the borrowing powers of the society; but the directors were in entire ignorance of the frauds that were being committed by their secretary. When the frauds were discovered, the society was ordered to be

wound up, and the claims of the plaintiffs who were depositors were disallowed as against the society, as such claims were in respect of moneys deposited after the borrowing powers of the society had been exhausted. This action was then brought against the defendants, who were directors of the society when the deposits were made, the claim being founded on the final clause of s. 43 of the Building Societies Act, 1874, which is in these terms: "If any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society receiving such loans or deposits on its behalf, shall be personally liable for the amount so received in excess."

The defendant Fisher was one of the trustees of the society; but he had only attended three meetings of the board of directors, and did not sign any of the certificates. Of the other defendants, some had and some had not signed receipts.

The learned judge, who tried the case without a jury, held that under the statute all the defendants were liable; and further, that the course of business established that the defendants had empowered Collison, upon his issuing to the depositor the official receipt, to represent on behalf of the directors that the borrowing powers of the society had not been exceeded, and that on this ground also the defendants were liable.

The defendants appealed.

Rigby, Q.C., Cyril Dodd, Q.C., and *H. Sutton*, for the defendant Fisher. Sect. 43 of the Building Societies Act, 1874, applies to an illegal receipt of money, and it must apply only to those directors who actually receive the money which is borrowed in excess of the statutory power of the society. It cannot mean that if some of the directors, acting as a quorum, receive the money, the other directors shall be personally liable for it, even though they know nothing of the transaction. In order to make a director personally liable, he must have himself received or authorized, or at least permitted, the receipt. Directors of a company are not agents of each other: *Cullerne* v. *London and Suburban General Permanent Building Society* (1); *Cargill* v.

(1) 25 Q. B. D. 485.

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Bower (1). On general principles, in order to make a director personally liable for a wrongful act, it is not sufficient that he should in a preliminary stage have authorized the doing of the act, unless he actually joins in carrying it out.

The words "committee of management," in s. 43, necessarily exclude all members of the committee who do not actually receive the money; those members who attend and make a quorum at any meeting are "the committee" on that occasion. On any other construction it would be impossible for a man, however careful he might be, to insure that a heavy liability might not be imposed on him. If he were present at a meeting at which it was proposed to borrow money illegally, and voted against the proposition, but was overruled by the majority, he would probably be liable if he did not at once take steps to restrain the directors from carrying out the loan. The question is, who are "the directors," or who are the "committee of management" who "receive" the money? The generality of the prior words is limited by the word "receiving"; otherwise all the directors would be made guarantors for each of their colleagues. They would be responsible for the acts of persons who are not their agents. Fisher never received this money, or authorized, or in any way joined in, the receipt of it. All that he knew was, that advertisements inviting loans were being issued by other persons, and that those advertisements stated that inquiries were to be made of the secretary. If any implied authority to receive money was given to the secretary by reason of the course of business, it was at the most an authority to receive money for the society, not an authority to receive on behalf of any one of the directors money which the secretary never intended to receive except for the purpose of applying it to his own purposes: *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2).

If the statute does not apply, it is said that the directors are liable at common law, on the ground that they warranted the power of the society to borrow. If so, the Statute of Limitations would be a defence; for the warranty was broken at the same moment at which it was given, and the cause of action accrued

(1) 10 Ch. D. 502.

(2) 18 Q. B. D. 714.

then: *Whitehaven Joint Stock Banking Co.* v. *Reed* (1); *Short* v. *McCarthy*. (2) The fraudulent receipt of money in excess of the borrowing powers of the society was outside the ordinary course of business.

As to the alleged breach of warranty, *Collen* v. *Wright* (3) and *Richardson* v. *Williamson* (4) are distinguishable. In the latter case the defendants, directors of a building society which had no power to borrow money, signed a receipt for money deposited by the plaintiff with the society, and it was held that the defendants were liable for breach of warranty. Fisher never signed a receipt for any of the moneys to which this action relates. In *Chapleo* v. *Brunswick Benefit Building Society* (5) the directors intended to make themselves personally responsible.

Sir H. Davey, Q.C., and *Scott Fox*, for the defendant R. R. Hodgson. The liability under s. 43 is imposed when the society receives the money, and it is imposed on the directors who receive it for the society. Neither of those conditions existed in the present case. A constructive, as distinguished from an actual, receipt by the society is not enough. The test is, whether the society ever had the legal control of the money, so that they could maintain an action for it, or prosecute a person for stealing it under an indictment which alleged that the property was in the society. The money was never under the control or at the disposal of Hodgson; he never authorized the secretary to receive it on his behalf; the only authority was to receive on behalf of the society. Hodgson never made any representation which can raise an estoppel against him. If he is responsible for the advertisements, they only held out the secretary as the person to give information, not as empowered to give receipts for money. To construe s. 43 as making every member of the board of directors responsible for moneys illegally borrowed would give no meaning to the words "receiving such loans or deposits on its behalf." Those words qualify and restrict the preceding words. Hodgson was never a member of a board or committee which received such loans or deposits. Any director who was present

(1) 54 L. T. (N.S.) 360, 362.
(2) 3 B. & A. 626.
(3) 7 E. & B. 301; 8 E. & B. 647.
(4) Law Rep. 6 Q. B. 276.
(5) 5 C. P. D. 331; 6 Q. B. D. 696.

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at a meeting of a board which acquired the control of the improperly borrowed money would be liable; but there is nothing in s. 43 to impose liability on any director who was not present at that particular meeting of the board at which the money purported to have been received. This construction will not render s. 43 of no use, for its effect will be to impose on directors a greater liability than was imposed on the directors in *Chapleo* v. *Brunswick Benefit Building Society.* (1) The directors who are liable will be so for the full amount of the loan, whatever may be the state of the society's assets, and every one of the directors who constituted the board which received the money will be liable independently of warranty.

The plaintiffs by their reply allege a warranty that the secretary had authority to bind the society. There was no written document which held out any such an authority. The secretary did not profess to bind the society. Each depositor obtained a receipt signed by two of the directors, and until he got that there was nothing which purported to bind the society. There was no warranty that the society had power to borrow.

If there was a warranty, the proper measure of damages is the loss which the plaintiffs have actually sustained. If the society was insolvent the depositor would recover nothing. His loss is that which he would have received in case the borrowing power which was warranted to exist had really existed: *In re National Coffee Palace Co.* (2) The time to ascertain the amount of the damage is the date at which the warranty is broken, one month after the date of the deposit note. That assumes that the depositor would at once have given a month's notice to withdraw his deposit.

The borrowing power of the society was not exceeded if the sums embezzled by the secretary out of the quasi loans are not taken into account.

Asquith, Q.C., and *R. Cunningham Glen*, for the defendant D. Brown. Brown is in no worse position by reason of his having signed receipts for some of the moneys deposited. He did not in fact receive the money. The deposit note states that the society has received the money; there is no statement that the

(1) 5 C. P. D. 331; 6 Q. B. D. 696. (2) 24 Ch. D. 367.

directors as individuals have received anything. The depositors must have known that the directors who signed the receipts had received the money for the society. Brown's signature was obtained by a representation made to him by the secretary that the depositor was a creditor of the society for the whole sum which he had advanced.

As to warranty, it is essential that the plaintiffs should shew that they changed their position by acting on the warranty. The signature of the deposit by a director creates no greater warranty on his part than if he had not signed. If any warranty was given it was given by the secretary. The crucial point to be considered is the time at which the lender came to the society's office and parted with his money believing that the secretary had the authority of the society to receive it.

Asquith, Q.C., and *Montagu Lush*, for the defendants Mather and Mews. Mather stands in the same position as the defendant, R. R. Hodgson; he did not sign any receipts for the moneys to which the action relates. Mews was a director in the years 1881, 1882, and 1883. In April, 1883, he was re-elected for three years; but in September, 1883, before the earliest of the transactions to which the action relates, he gave notice to the secretary that he should not act, and he never attended a meeting of the board after he gave that notice; and during the period in question he never signed any receipts. As he had served for three years, he could not be compelled to act as director any longer.

H. T. Kemp, for the defendants James Hodgson, Milestone, and Redfearn. These defendants were all elected after the resolution as to deposits above 50*l.*, and none of them signed any receipt for any of the moneys in question in this action.

Lawson Walton, Q.C., and *E. Silvester*, for the plaintiffs. As to the construction of s. 43, the society itself cannot receive money; it must be received by some person authorized to receive it on their behalf. Bankers of the society would stand in exactly the same position as the secretary; they would receive money only by the authority of the board of directors. It is argued that the society can receive only money which is applied for its benefit. No such distinction is to be found in s. 43. The fact of receipt cannot depend upon the subsequent application of the money,

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otherwise the directors would be responsible only for moneys which are applied for the benefit of the society. It is argued that only those directors are responsible who actually receive the money; but directors never actually receive money. It is said that only those directors are responsible who are present at a meeting of the board at which the receipt of money is authorized. This would be to punish those directors who do their duty, and to let off those who do not. If this is what was intended by s. 43, words would have been inserted in it limiting the liability, instead of imposing it upon the directors collectively. As to the suggestion that the secretary never had any intention of receiving the money for the society, but always intended to appropriate it to his own use when he received it, he received it in pursuance of the authority which had been conferred on him, and his subsequent misapplication of it cannot alter the nature of the receipt. The moment the money was received by him it was in the hands of the board. They could only receive it through an agent, and they had, as they were entitled to do, appointed him their agent to receive it.

Sir H. Davey, Q.C., in reply.

LORD HALSBURY, L.C. I am of opinion that the judgment should be affirmed against all the defendants.

The society, out of whose proceedings the question before us arises, was formed for the purpose of obtaining, by the principle of co-operative action, houses or pieces of land by persons who subscribe to the society. The rules of the society are directed to that object, and proper safeguards and checks are provided. It was part of the business of the society as constituted to receive money as a deposit on loan; but in respect of that part of their business they do not seem to have made any particular regulations, nor was any proper machinery provided, as there had been with regard to the other part of the business. The result is that, instead of looking to rules, we are obliged to infer what was the course authorized by the governing body in respect of such deposits by looking at the practice which was adopted. From the earliest period of the existence of the society to the end, there appears to be no machinery provided for the receipt of

deposits, and no provision in respect of what was to become of the money between the time of its receipt by some one on behalf of the society and the acknowledgment of its receipt by the directors, and no express provision as to its destination after it has been received. In fact, we know that Collison received the deposits; that he from time to time procured that receipts should be given, and that he took into his own hands the payment of interest. I do not stop to inquire how he did this, because there is no rule directly bearing on the matter; and what he was bound to do was to obey all the directions of the board of directors. From the general course of business, and from the resolution of the board as to the limit of 50*l.*, it is to be inferred that whatever might be the form of application, and whatever was to be done with the money when accepted by the board, Collison was to receive and manage the deposits. There seems, so far as I see, no express obligation on Collison to pay the deposits into a bank. Under these circumstances, it is in the first place desirable to see—assuming the case of a proper and regular transaction not in excess of the borrowing powers of the society—whether the receipt of the deposits by Collison would be a receipt by the society. He received such moneys by the authority of the society, and whether they were in his pocket or in the till I do not see why it was not as valid a receipt by the society as if the moneys were in the hands of its bankers. I can draw no distinction between the two cases. The society had by its practice and course of business made receipt by Collison the ordinary mode of receipt, and the moment the lender paid Collison the money upon the contract which the society had authorized to be made on its behalf the transaction would be complete as between the lender and the society, who would be liable thereupon to repay the money, and to pay the interest due on it. The objection now raised is that the amount advanced to the society was beyond that which it had authority to receive, and that, therefore, the society could not receive it. The legislature regarded it as a hardship that a person who had no knowledge, and no means of knowledge, as to whether the borrowing powers of the society had been exhausted, should not be repaid his advance in such a case, and, in view of that hardship, s. 43 of the

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Building Societies Act, 1874, was enacted; and I am prepared to decide this case simply on the construction of this section.

The section deals with the case of the receipt, by a society constituted under the Act, of loans or deposits in excess of the limits prescribed by the Act, and purports to make the governing body personally liable for moneys so received. Let us see if the language used is to be limited as contended for by the appellants. It is said that, because the section speaks of the receipt by the directors or committee of management (which, I take it, is an alternative in view of the fact that some societies have a board of directors and others a committee of management), this must be confined to such of the governing body as have in their individual capacity received the deposits. The first answer to this suggestion is that such a narrow construction would render the section inoperative. Directors do not receive in their individual capacity; they can only receive deposits through the society's ordinary channel of receipts, and they would receive excess loans or deposits in the same manner as others, in this case by the person who was authorized to receive on their behalf. The second observation which arises is, that if the construction contended for is to be placed on the section, one would expect to find words limiting its application to the governing body, "or such one or more of them as shall have received such loans or deposits." No such words are there, and, although the liability is personal, the thing done is done on the authority of the governing body, and it is reasonable that the legislature should say that each member of the governing body should be liable for the act which that governing body had wrongfully permitted to be done. The thing contemplated is that the members of the governing body, either themselves and with knowledge, or by giving authority to others and without knowledge, have enabled that to be done which it was their duty as the governing body to prevent.

Without going through the particular parts of the evidence applicable to each director, it is sufficient to say that each and all of them permitted Collison to have full and complete control, and made him their agent in doing that which the legislature has said should not be done, namely, receive loans in excess of

the borrowing powers of the society. The lenders have no right against the society; but the legislature intended that those who acted on the board should be personally liable for that which, if it had been an act within the authority of the society, would have been binding on the society. In this view no distinction can be drawn between one director and another, and whether the defendant Fisher was a trustee or not is immaterial, because it is manifest he was a director, and comes within the same category as the other directors. Various questions have been raised and gone into as to the knowledge or the absence of knowledge of the different directors; but in the view we take it is immaterial to go into such questions. All that it is necessary to establish is the fact of the authority by the board to Collison to receive deposits, and that each defendant was a member of the board at the time the deposits were received, and upon proof of these facts and that the deposits received were in excess of the borrowing powers of the society, the Act makes each of the defendants responsible.

The decision of the learned judge will be affirmed.

LORD ESHER, M.R. In this case it is necessary to determine what are the true facts with regard to these deposits, and what effect the statute has on the liability sought to be enforced against the defendants. The society, the primary purpose of which was to act as a building society, had a limited power to receive money by way of deposit on loans. The persons who were to negotiate such loans with the lenders were the directors of the society. In the case of directors, if there were no provision for a quorum, all would have to be present and act together; but if there is provision for a quorum, the act of those present and forming the quorum is the act of the governing body. It was for the directors to arrange whether the society would borrow, and if so, they would further have to arrange how they would borrow, and as to the receipt of the money. As to this there was no rule, and the board would have to determine how the money should be received. There can be no doubt that they determined that Collison should receive the deposits, and he did so by their authority, and the receipt by him was a receipt

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by the directors; and as they received it for the society, it amounted to a receipt by the society; so that, unless there had been a restriction on the borrowing powers of the society, we should be obliged to say that the society had received these deposits. But then these deposits were in excess of the borrowing powers of the society; and so the society is not bound, but by the Act other persons are made liable. Those persons are the directors, who are personally liable: just as any member of a partnership is liable for the debts of his firm, though he has rights over against his partners. Each member of the body is personally liable: that is what the learned judge has held, and I entirely agree with him. The board delegated powers to Collison; and I desire to say that in my view, even if knowledge of that delegation were not brought home to one of them, he would still be liable if the delegation was made by a sufficient quorum of directors; but if more is required, it is in this case idle to argue that any of the defendants had no knowledge of it. All the defendants are therefore liable, and the judgment appealed against must be affirmed.

FRY, L.J. The words of the last clause of the 43rd section of the Building Societies Act, 1874, begin with a statement of the event or contingency upon which the provisions of the section are to come into operation. The words are "if any society under this Act receives loans or deposits in excess of the limits prescribed by this Act." These words create this difficulty, that a society whose powers to receive deposits is limited by the Act cannot as such receive money in excess of its borrowing powers. The meaning to be attached to this sentence must therefore be—that if money is received by somebody under such circumstances that but for the limitation it would have been properly received by the society, then the section is to come into operation, provided the money so borrowed be in point of fact in excess of the limits. The same observation applies to the operative part of the section, "the directors or committee of management of such society receiving such loans or deposits on its behalf." The directors cannot receive money on behalf of the society in excess of its borrowing powers; and this therefore refers to directors who

would have been recipients of money for the society if such receipt had been within the prescribed limits.

This being so, two inquiries on matters of fact seem to me to arise: first, whether the money in question would have been money received by the society if it had not been restricted by the limits imposed on its borrowing powers; and secondly, a like question with regard to the board of directors. As to the first of these questions, the rules of the society provide that the board shall have power to borrow such sums of money as shall be from time to time required for the purpose of the society, and to give receipts for the same; and such receipts are to be in the name of the society, and are to be signed by two of the directors, and countersigned by the secretary. Now, that course was pursued. The board issued advertisements inviting persons to lend money to the society, and the board allowed Collison's to be the sole hand to receive the deposits that might be forthcoming in answer to such advertisements, and two directors from time to time signed the formal receipts, which were countersigned by Collison. Everything, therefore, was regular, except the excess of the moneys received over the limits prescribed by the Act. So far, then, the contingency provided for in the section is shewn to have happened.

Then, as to the second inquiry. Have we before us directors who within the meaning of the Act have received this money on behalf of the society? It is to be observed that the section assumes that, whenever a society has received money in excess of its borrowing powers, there are directors or a committee of management who have received it on its behalf. These words are not part of the contingency mentioned in the section, but are part of the operative clause making them liable. Nevertheless it is, I think, obvious, that unless the directors can be said within the meaning of the Act to have received the money, they could not be made liable, because they would not answer the description of the persons referred to in that part of the section.

Has this money been so received as that, if it had been within the borrowing powers, the lender was assured by the whole board of directors that the money had been received by the board? In regard to that question, I should apply the same rule as in the

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first case. The rules provide that the board may borrow; the board may give receipts; and those receipts are to be given by the signature of two of the members of the board. Everything prescribed by the rules was, so far as the lender knew, done by the board of directors in this case; and if they chose to delegate their duties, and to allow the secretary to receive the deposits and the receipts to be given in the form prescribed by the rules, so that as between the society and the lender the lender has done everything which he can do, then in my opinion the result must be that the directors were persons who had received this money on behalf of the society. Therefore I think the two questions of fact must be answered in the affirmative: this was money received by the society; this was money received by the directors. In that case the directors are personally liable. Therefore the judgment must be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Rollit & Sons, for Laverack & Son, Hull.*

Solicitors for defendants: *Collyer-Bristow & Co., for Stamp, Jackson, & Birks, Hull; Oldman & Clabburn, for Thomas Stephenson, Hull; J. W. Sykes, for Chatham & Son, Hull; Bell, Brodrick, & Gray, for J. T. & H. Woodhouse, Hull; F. Blundell Moss, for Moss, Lowe & Co., Hull; J. W. Sykes, for T. B. Redfearn, Hull.*

A. M.

WANDSWORTH DISTRICT BOARD *v.* BIRD.

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Jan. 13, 14, 27.

Metropolis—Management Acts—Sewers—Streets, Laying out of—Excavation—Powers of Vestry or District Board—Metropolis Management Amendment Act, 1890 (53 & 54 *Vict. c.* 66), *s.* 6.

By the Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), s. 6, it is enacted, that "Subject to the provisions of this Act, it shall not be lawful after the passing of this Act to form or lay out, or to commence to form or lay out, any street, road, passage, or way over land from which sand, gravel, or other subsoil has been excavated or removed, until the site and subsoil of the street, road, passage, or way has been properly levelled and made good to a sufficient depth with stones, gravel, or other suitable material to form a sound foundation, to the satisfaction of the vestry or district board, to be expressed in writing, and it shall not be lawful to excavate, remove, or take away any sand, gravel, or subsoil from any land upon which any street, road, passage, or way has been wholly or in part formed or laid out, or upon which it is intended to form or lay out any street, road, passage or way, except upon such conditions as to the levelling and making a proper foundation for the same as the vestry of the parish or district board of the district may in writing impose. Provided that this section shall not apply where no more sand, gravel, or subsoil has been or is intended to be excavated, removed, or taken away than is necessary to level or form a foundation for the paving, metalling, or flagging of any street, road, passage, or way. If the vestry or district board shall refuse their approval in writing or shall impose conditions, any company or person dissatisfied with such refusal or with such conditions may . . . appeal to the London County Council":—

Held, that under the section, where a street has been laid out or is intended to be laid out on land on which no excavation has as yet taken place, the vestry or district board has no power absolutely to prohibit excavation to a greater extent than that allowed by the saving clause, but can only impose conditions as to the levelling and making a proper foundation for the street.

Case stated by a metropolitan police magistrate at the instance of the appellants, the Wandsworth District Board, who were dissatisfied with his determination of a question of law upon the hearing of a summons preferred by them against the respondent Earle Bird, under s. 6 of the Metropolis Management Amendment Act, 1890 (1), charging that he did "excavate,

(1) By the Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), s. 6, "Subject to the provisions of this Act, it shall not be lawful after the passing of this Act to form or lay out, or to commence to form or lay out, any street, road, passage, or way over land from which sand, gravel, or other subsoil has been excavated or removed, until the site and subsoil of the street, road, passage, or way has been properly levelled and made good to a sufficient depth with stones, gravel, or other suitable material to form a sound

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remove, or take away sand, gravel, or subsoil from land upon which a street, to wit, Brayburne Avenue, was being formed by him without their consent in writing."

It appeared that the respondent was the owner of the land and had obtained the consent of the London County Council to form the street, and that of the appellants, in whose district the site was, to make a sewer.

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foundation, to the satisfaction of the vestry or district board to be expressed in writing, and it shall not be lawful to excavate, remove, or take away any sand, gravel, or subsoil from any land upon which any street, road, passage, or way has been wholly or in part formed or laid out, or upon which it is intended to form or lay out any street, road, passage, or way, except upon such conditions as to the levelling and making a proper foundation for the same as the vestry of the parish or district board of the district may in writing impose. Provided that this section shall not apply where no more sand, gravel, or subsoil has been or is intended to be excavated, removed, or taken away than is necessary to level or form a foundation for the paving, metalling, or flagging of any street, road, passage, or way. If the vestry or district board shall refuse their approval in writing or shall impose conditions, any company or person dissatisfied with such refusal or with such conditions may, within seven days from the date of receiving notice of such refusal or of such conditions, appeal to the Council, and such appeal shall stand referred to such committee of the Council as the Council may appoint, and such committee shall have power to confirm or reverse such refusal, or to vary the conditions imposed, or impose such conditions as they may think fit, and their determination shall be final, and such committee may order any costs of such appeal to be paid to or by the vestry or district board or person appealing. Any company or person forming or laying out, or commencing to form or lay out, any street, road, passage, or way, or excavating, removing, or taking away any sand, gravel, or subsoil contrary to the provisions of this Act or to the conditions imposed by the vestry or district board, or on appeal by the Council, shall, for every such offence, be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding twenty shillings for every day after the first during which the offence is continued, or during which such excavation shall be permitted to remain without the consent in writing of the vestry or district board, or on appeal of the Council.

"Provided always that nothing in the section contained shall apply to any road, passage, or way formed or laid out, or to be formed or laid out, and intended to be maintained as a road, passage, or way not open to public use:

"Provided also that nothing in this section contained shall prejudice or affect any existing rights of the owner of property fronting or abutting on any street, road, passage, or way, to excavate subsoil for the purpose of forming or constructing cellars, vaults, subways, or basements in connection with buildings erected on such property."

On April 18, 1891, the respondent's surveyor wrote to the appellants' clerk as follows:—

"Brayburne Avenue.

"In reference to the sewer about to be constructed by my client, Mr. Earle Bird, I now beg to hand you a section shewing the proposed mode of excavation for the sewer gullies and house-drains. These latter will occupy every sixteen feet on each side, and would, therefore, make it impracticable to do this work in trench even if desirable.

"The Metropolis Management Amendment Act, 1890, gives my client the right to excavate in this way, 'subject only to such conditions as to the levelling and making a proper foundation as the board may in writing impose.'

I shall be glad, therefore, to hear from you what conditions the board consider necessary. My client proposes to fill in such excavations with hard core and to construct the road as shewn by the enclosed section and to your satisfaction."

On May 8, the appellants' clerk answered, that he was directed by the board to inform the respondent, that having considered his application, they had resolved to refuse their approval to the excavation of any sand, gravel, or subsoil from the land in question beyond what was "necessary to level or form a foundation for the paving, metalling, or flagging of the road."

The respondent, without making a further application to the appellants or appealing to the London County Council, excavated according to the section sent to the appellants by his surveyor, and to a depth greater than that indicated in the letter of their clerk.

The magistrate held that the respondent had not committed any offence under s. 6 of the Metropolis Management Amendment Act, 1890, and dismissed the summons.

Channell, Q.C. (*J. C. Earle,* with him), for the appellants. The appellants are right in their construction of the section. The only excavation which can take place without their consent is excavation to the extent defined in the saving clause which is cited in their clerk's letter. The section appears expressly to

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enact that it is unlawful to excavate beyond this extent, "except upon conditions which the board may in writing impose."

R. M. Bray, for the respondent. There are no words in the section which make it an offence to "excavate without the consent of the board." The second enactment in the first part of the section alone applies, and under it the appellants had no power absolutely to prohibit the excavation of land which it was proposed to excavate for the first time, to a greater depth than that allowed by the saving clause. They could only "impose conditions" upon excavation beyond this depth, and this by their clerk's letter they refused to do.

Channell, Q.C., in reply. The subsequent part of the section speaks of "refusal of approval" as an alternative to imposition of conditions.

Cur. adv. vult.

Jan. 27. HAWKINS, J. The 6th section of the Metropolis Management Amendment Act, 1890, deals first with the case in which there has been, secondly with the case in which there has not been, previous excavation of land on which it is intended to lay out a street. The section enacts that in the first case the street shall not be laid out until the site is levelled to the satisfaction of the district board to be expressed in writing, and that in the second case there shall be no excavation, "except upon such conditions as to the levelling and making a proper foundation" for the street as the district board "may in writing impose." These enactments are followed by a saving clause, and by provisions as to an appeal from the decisions of the district board to the County Council.

This is a proceeding under the second enactment, and the summons charges the respondent with excavating soil in Brayburne Avenue where he was laying out a street, without the consent in writing of the appellants, the district board. It does not charge him with excavating in a manner contrary to conditions imposed on him by them, but with excavating at all without their consent. The object of the letter of the respondent's surveyor was to ask the appellants to state the conditions under which they would allow the excavation to be made. The answer

of the appellants' clerk was an absolute refusal, so far as the district board was concerned, to allow any excavation. The question raised is, Aye or no, had the appellants power under the section absolutely to refuse to allow any excavation, or had they only power to "impose conditions as to levelling and making a proper foundation for" the new street?

The case was ingeniously argued. Any one reading the section would, I think, be constrained frankly to admit that its meaning is not very clear. But we are, on the whole, of opinion that the contention of the respondent is right, and that a district board has not power, where a street is being laid out on land which has not been previously excavated, absolutely to prohibit excavation to a greater extent than that allowed by the saving clause, but has only power to impose upon the person who is forming the street conditions as to levelling and making a proper foundation. Of course these may be stringent. We think the meaning of the words is that, where there has been an excavation, it is to be filled up to the satisfaction of the district board, which is to be expressed in writing, and that, where there has been no excavation, excavation, except as allowed by the saving clause, can only take place under conditions as to levelling and making a proper foundation which are also to be imposed in writing by the district board.

The section continues, "if the district board shall refuse their approval in writing," and it was argued that these words gave the appellants the power of absolute refusal. But it is necessary to read on. The sentence proceeds, "or shall impose conditions, any company or person dissatisfied with such refusal or with such conditions may appeal to the council." It seems clear that "approval" refers to and is used as a synonym for "satisfaction" in the preceding part of the section, and that the refusal of approval refers to the first case in which there has been previous excavation, while the imposition of conditions refers to the second case in which there has not been previous excavation. If the legislature intended to confer upon these bodies the power of absolutely and apart from any question of conditions prohibiting excavation in the second case, it is strange that a penalty of only 5*l.* should be imposed for disobedience to such an order. It

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is true that the section also imposes a fine of 1*l.* for every day during which the offence is continued; but this, also, would be a very inadequate penalty for so serious an offence as the excavation of subsoil in a place which is being laid out as a street in defiance of the prohibition of a body having absolute authority in the matter.

The summons therefore discloses no offence, and there must be judgment for the respondent.

WILLS, J. I entirely agree with my learned brother, whose judgment is to be regarded as the judgment of the Court.

Judgment for the respondent.

Solicitor for the appellants: *W. W. Young.*
Solicitors for the respondent: *Hargrove & Co.*

H. D. W.

Jan. 14.

IN RE DUTTON.

Juror—Exemption from Service—Coroner's Jury—County Juries Act, 1825 (6 *Geo.* 4, *c.* 50), *ss.* 1, 2, 8, 25, 52—*Juries Act*, 1870 (33 *&* 34 *Vict. c.* 77), *ss.* 3, 9, *and Schedule—Coroners Act*, 1887 (50 *&* 51 *Vict. c.* 71), *s.* 3.

The exemption from service upon juries which is conferred by s. 52 of the County Juries Act, 1825, s. 9 of the Juries Act, 1870, and the schedule to that Act, extends to service upon coroners' juries.

RULE calling upon the coroner for the county of London to shew cause why a writ of certiorari should not issue to bring up and quash an order made by him condemning William Dutton, a solicitor's managing clerk, in a fine of 5*l.* for refusing to serve on a coroner's jury.

Macmorran, shewed cause. The coroner had jurisdiction to impose the fine. By s. 3 of the Coroners Act, 1887, it is his duty, on notice of a suspicious death, "as soon as practicable to issue his warrant for summoning not less than twelve nor more than twenty-three good and lawful men." The Act does not exempt any class from liability to serve. By the statute of Marlborough (52 Hen. 3, c. 24), which was only repealed by

26 & 27 Vict. c. 125, all persons of over twelve years of age could be summoned. By 4 Edw. 1, st. 2, which was only repealed by the Act of 1887, the coroner was "forthwith to command those of the next four towns or five or six to appear before him." There is no exemption by the Common Law or by statute, and the practice is to impanel a jury of the statutory number whose names are taken from the parliamentary register for the neighbourhood.

It may be contended that the effect of s. 9 of the Juries Act, 1870, and the schedule, which exempts, among others, "solicitors' managing clerks" from service "upon any juries or inquests whatsoever," is to make the fine illegal. But by s. 4 this statute is to be "construed as one with the County Juries Act, 1825," s. 2 of which itself exempts certain classes from service "upon any juries and inquests whatsoever." The exemption, however, in s. 2 of the Act of 1825, and the provisions as to jury lists and summoning juries in ss. 8 and 25, are governed by s. 1, which, in specifying the proceedings to which the Act refers, omits all mention of coroners' inquests. The exemption in the Act of 1870 should, therefore, be read with this limitation. This construction of the Act of 1825 is supported by the terms of the proviso in s. 52 (1), and by the fact that none of the Acts

(1) By the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 52: "And be it further enacted, that no man shall be liable to be summoned or impanelled to serve as a juror in any county in England or Wales, or in London, upon any inquest or inquiry to be taken or made by or before any sheriff or coroner, by virtue of any writ of inquiry, or by or before any commissioners appointed under the Great Seal, or the seal of the Court of Exchequer, or the seals of the Courts of the said Counties Palatine, or the seals of the Courts of Great Session in Wales, who shall not be duly qualified according to this Act to serve as a juror upon trials at Nisi Prius in such county in England or Wales or in London respectively: Provided always, that nothing herein contained shall extend to any inquest to be taken by or before any coroner of a county by virtue of his office, or to any inquest or inquiry to be taken or made by or before any sheriff or coroner of any liberty, franchise, city, borough, or town corporate, not being counties, or of any city, borough, or town, being respectively counties of themselves, but that the coroners in all counties, when acting otherwise than under a writ of inquiry, and the sheriffs and coroners in all such places as are herein mentioned, shall and may respectively take and make all inquests and inquiries by jurors of the same description as they have been used and accustomed to do before the passing of the Act."

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repealed in the schedule relate to the constitution of coroners' juries.

F. W. Hollams, in support of the rule, was not heard.

HAWKINS, J. I am of opinion that the statutory exemption from service upon juries applies as well to coroners' juries as to other juries. I do not think it necessary to enter upon any very minute examination of the language of the various statutes, some ancient and some modern, which have been referred to. I think that the rules for the selection of jurors contained in the two modern statutes apply to juries for the trial of the issues in the superior and inferior Courts which are referred to in s. 1 of the County Juries Act, 1825, but not to coroners' juries; and I think that s. 2 of that Act expresses with precision the intention of the legislature as regards exemption from service upon all juries, coroners' juries included. Coroners' juries have to be called together in haste, and for this reason the ordinary rules for summoning juries do not apply to them; but it is impossible to suggest any reason for a different rule as to exemption from service upon coroners' juries. If the rule is not the same in both cases, no one is exempt from service upon coroners' juries; and, among others, judges and coroners themselves can be summoned. It is impossible that this can be the case at the present day. Those persons who by s. 2 of the Act of 1825, and s. 9 and the schedule to the Act of 1870, are exempt "from serving upon any juries and inquests whatsoever," are exempt from service upon coroners' juries. The coroner had, therefore, no power to summon the applicant, who, as a solicitor's managing clerk, is, by the schedule to the Act of 1870, exempt from liability to serve on any jury, and the order appealed from must be quashed.

WILLS, J. I am of the same opinion. The learned counsel has attempted to support the order of the coroner in an able and temperate argument; but the question is not open to serious doubt. Sect. 9 of the Juries Act, 1870, which is to be construed as one with the County Juries Act, 1825, exempts the applicant, as a member of a class named in the schedule, that of solicitors' managing clerks, from serving "upon any juries or

inquests whatsoever." He is exempt, therefore, from serving upon a coroner's jury, unless there is some good reason for construing the words "upon any juries or inquests whatsoever" otherwise than according to their natural meaning.

The omission in s. 1 of the County Juries Act, 1825, of a reference to coroners' inquests is certainly no reason for doing this. Of the passages from the statutes which were cited, one alone caused me to pause for a moment: I mean the clause in s. 52 of the County Juries Act, 1825, "Provided always . . . that coroners shall and may make all inquests and inquiries by jurors of the same description as they have been used and accustomed to do before the passing of the Act." If these words are to be interpreted literally, and it is true that before 1825 there was no exemption from service upon coroners' juries, they do seem to say that this state of things is to continue. In that case I can only say that, if there is an inconsistency between s. 52 and s. 2, it is clear that s. 52, and not s. 2, must give way. The enactment on which the proviso in s. 52 is grafted refers to proceedings before coroners, by virtue of a writ of inquiry, while the proviso itself refers to inquests to be held by coroners by virtue of their office. It is therefore possible to construe the proviso as confined in its application to the section itself, and as not extending to the Act as a whole; whereas to limit the effect of "upon any juries or inquests whatsoever" in s. 2 would be to make sheer havoc of the language of the section.

So much for the words of the enactments. As regards their substance, the reasons for this construction are overwhelming. The classes which are privileged from serving on juries have had this immunity conferred upon them, not out of any tenderness towards them on the part of the legislature, but because for grave reasons of public policy it has seemed better that they should not be subject to the burden. Public servants, judges, officers in the Army and Navy, are exempted in order that they may not be interrupted in the discharge of their public functions; clergymen, members of the medical and legal professions, and others in order to enable them to be prompt and punctual in rendering their services to the community. It is obvious that the reasons for the immunity apply as much to coroners' juries

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as to other juries. There is no reason, therefore, for construing the words otherwise than according to their natural meaning. The order must be quashed.

Order quashed.

Solicitor for the applicant: *A. Jonas.*
Solicitor for the coroner: *J. R. Baron.*

H. D. W.

Feb. 13.

THE QUEEN *v.* JUSTICES OF ESSEX.

Justices — Practice — Court of Summary Jurisdiction — Appeal to Quarter Sessions—Notice of Appeal—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 2.

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-s. 2, it is provided that in appeals to general or quarter sessions the appellant shall give notice of appeal "by serving on the other party and on the clerk of the court of summary jurisdiction notice in writing of his intention to appeal:"—

Held, that the notice of appeal to be served on the clerk of the court of summary jurisdiction need not be addressed to the justices from whose decision the appeal is brought.

RULE calling upon the justices of the peace for the county of Essex to shew cause why a writ of mandamus should not issue directing them at their next court of quarter sessions to hear an appeal by William Stark against a conviction for assault by a court of summary jurisdiction for one of the divisions of the county.

It appeared that notice of appeal had been served on the clerk of the court of summary jurisdiction on the day on which the decision had been given, but that such notice was addressed to the clerk and not to the justices from whose decision the appeal was brought. (1)

Wedderburn, shewed cause. The court of quarter sessions had not jurisdiction to hear the appeal. It is essential that the statu-

(1) By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-s. 2: "The appellant shall within the prescribed time, or, &c., give notice of appeal by serving on the other party and on the clerk of the said court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal."

tory notice should be addressed to the convicting justices. They are entitled to know that their decision has been appealed from, in order that they may have an opportunity of attending and supporting or explaining it: *Ex parte Curtis.* (1)

Wightman Wood, supported the rule.

WRIGHT, J. We should, I think, put too narrow a construction on the statutory direction that a notice of appeal is to be served on the clerk to the justices, if we were to hold that it was not satisfied by a notice of appeal addressed to him. I believe that the object of the legislature was to lessen the number of steps in the procedure, and so to prevent expense. It was found difficult for an appellant to serve notices of appeal on the convicting justices, and it was therefore deliberately enacted that it should be sufficient for him to serve a notice on the clerk, leaving it to the clerk to give notice to the convicting justices, whose names he can easily find in the minutes of the proceedings. The rule must be made absolute.

LAWRANCE, J., concurred.

Rule absolute.

Solicitors: *Wilson & Son; Wontner & Sons.*

H. D. W.

THE QUEEN *v.* JUSTICES OF PORTSMOUTH.

Feb. 15.

Vaccination—Justices—Penalty for Disobedience to order for the Vaccination of a Child—Previous Conviction—Vaccination Act, 1867 (30 *&* 31 *Vict. c.* 84), *ss.* 29, 31—*Vaccination Act,* 1871 (34 *&* 35 *Vict. c.* 98), *s.* 11.

By the Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 31: "If information be given to a justice that a child under the age of fourteen years has not been successfully vaccinated, and that notice has been given to the parent of such child to procure its being vaccinated, and has been disregarded, the justice may summon such parent to appear with the child before him, and if the justice shall find upon examination that the child has not been vaccinated . . . . he may, if he see fit, make an order directing the child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been vaccinated, the person upon whom such order shall have been made shall be proceeded against summarily; and, unless he can shew reasonable ground

(1) 3 Q. B. D. 13.

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for his omission to carry the order into effect, he shall be liable to a penalty not exceeding twenty shillings":—

Held, that a parent who has been fined under this section for disobedience to an order for the vaccination of his child cannot be again fined for disobedience to the same order.

RULE calling upon two of the justices of the peace for the borough of Portsmouth to shew cause why a writ of certiorari should not issue to quash a conviction by them of Stephen Henry Heal on July 28, 1891, for disobedience to an order of a court of summary jurisdiction for the borough, dated March 24, 1891, for the vaccination of his child pursuant to s. 31 of the Vaccination Act, 1867, on the ground that the defendant had been previously convicted of disobedience to such order.

It appeared that on December 3, 1890, the defendant was convicted of neglecting to take the child to be vaccinated pursuant to s. 29 of the Act, and was fined. The child not having been vaccinated, on February 9, 1891, the vaccination officer gave the defendant notice of his intention to take proceedings under s. 31, and, the notice having been disregarded, laid an information. On March 24, the defendant appeared before a court of summary jurisdiction, and the order in question was made directing him to cause the child to be vaccinated within fourteen days. The defendant did not obey the order, and was in consequence, on April 28, on the information of the vaccination officer, sentenced to a fine of eleven shillings, with nine shillings to the informant in respect of costs, and this amount was recovered under a distress warrant. On May 20, the guardians for the union gave special directions to the vaccination officer to take further proceedings against the defendant for disobedience to the order of March 24, and on his information the defendant was on July 28 sentenced to a fine of the same amount, which was recovered in the same manner. (1)

(1) By the Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 29: "Every parent or person having the custody of a child who shall neglect to take such child or to cause it to be taken to be vaccinated, or, after vaccination, to be inspected, according to the provisions of this Act, and shall not render a reasonable excuse for his neglect, shall be guilty of an offence and be liable to be proceeded against summarily, and upon conviction to pay a penalty not exceeding twenty shillings."

By s. 31: "If any registrar or any officer appointed by the guardians to

Macmorran, shewed cause. It is submitted that the effect of s. 31 of the Act of 1867, and s. 11 of the Act of 1871, is to render disobedience to an order for the vaccination of a child a continuing offence from day to day throughout the duration of the prescribed period, and that the Court had therefore power to fine the defendant again under the order of March 24, such order not having been exhausted by the first fine.

The control given to the Local Government Board by ss. 5 and 16 of the later Act is sufficient guarantee against an oppressive use of the powers with which the Acts invest guardians and vaccination officers.

[WRIGHT, J. In *Allen* v. *Worthy* (1), the second conviction under s. 31 of the earlier Act took place upon a second order. The principle which applies is stated in *Pilcher* v. *Stafford* (2).]

The question of the necessity for a second order did not arise in *Allen* v. *Worthy*. (1) In that case s. 31 is treated as having been introduced in order to prevent the application of *Pilcher* v. *Stafford* (2); and in some of the references to *Allen* v. *Worthy* (1)

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enforce the provisions of this Act, shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child at a certain time and place, and, upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated, nor has already had the smallpox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been so vaccinated, or shall not be shewn to be then unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such order shall have been made shall be proceeded against summarily, and, unless he can shew some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding twenty shillings."

By the Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 11: "Any complaint may be made and any information laid for an offence under the Vaccination Acts, 1867 and 1871, at any time not exceeding twelve months from the time when the matter of such complaint or information arose, and not subsequently."

(1) Law Rep. 5 Q. B. 163.

(2) 4 B. & S. 775; 33 L. J. (M.C.) 113.

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which are made in *Knight* v. *Halliwell* (1) the offence is spoken of as a continuing one. If, as is implied in *Knight* v. *Halliwell* (1), notice to an offender against the Vaccination Acts is, by virtue of s. 11 of the later Act, good for twelve months from the time when it is given, why is not the order which is founded upon the notice good for the same period? The statutory offence under s. 31 of the earlier Act is disobedience to the order, and it is submitted that this offence is committed every day during which the child remains unvaccinated till the expiration of a year from the date of the notice.

E. U. Bullen, in support of the rule, was not heard.

LAWRANCE, J. I am of opinion that the conviction should be quashed. It is clear that under s. 31 of the earlier Act more than one penalty may be recovered. The question is as to the necessity for a second order when it is sought to recover a second penalty. In *Allen* v. *Worthy* (2), a second order had been obtained, and the point was, therefore, not raised. I think that a second order is necessary, for otherwise a man may be proceeded against under the section for a whole year without a fresh order; a construction for which I know of no authority.

WRIGHT, J. I am of the same opinion. I think that there is nothing in the language of the section which makes disobedience to an order for the vaccination of a child a continuing offence, and that the case, therefore, falls within the principle of *Crepps* v. *Durden* (3), that a man is not to be proceeded against twice for what is substantially one offence. There must be a second application to the justices, that they may have an opportunity of exercising their discretion as to making a second order.

Conviction quashed.

Solicitors: *Rowcliffes, Rawle, & Co., for Addison, Portsmouth; A. W. Mills, for G. Feltham, Portsmouth.*

(1) Law Rep. 9 Q. B. 412. (2) Law Rep. 5 Q. B. 163.
(3) 1 Sm. L. C. 9th ed. p. 692.

H. D. W.

CONSOLIDATED COMPANY *v.* CURTIS & SON.

1892
Feb. 27;
March 1.

Trover—Conversion of Chattels—Sale by Auction on Private Premises—Liability of Auctioneer.

The owner of certain household furniture assigned it by bill of sale to the plaintiffs. Subsequently to the assignment, the assignor employed the defendants, a firm of auctioneers, to sell it by auction on her behalf at her private residence. The defendants, who had no notice of the bill of sale, accordingly sold the furniture at the assignor's residence, and in the ordinary course delivered it there to the purchasers. The plaintiffs brought trover :—

Held, by Collins, J., that the defendants were liable.

ACTION for conversion of goods, tried before Collins, J., without a jury.

One Annie Russell, being then in occupation of a house known as Boscombe Villa, 160, Christchurch Road, Bournemouth, assigned by bill of sale to the plaintiffs certain household furniture then being on such premises. Subsequently to the assignment, she removed together with the furniture to 13, Seamoor Road, Westbourne. Whilst residing there, she instructed the defendants, a firm of auctioneers, to sell the furniture by auction on her behalf at her residence. The defendants accordingly sold it there, and delivered it there, as was admitted, in the ordinary course to the purchasers. Evidence was given that it was the ordinary course for auctioneers, as well when the auction took place at a private residence as when it took place in a public auction-room, to effect delivery to the purchasers. The defendants had no notice of the bill of sale, or of any defect in Russell's title to the furniture.

Lynden Bell, (*Cock*, *Q.C.*, with him), for the plaintiffs. The defendants are liable. The case is within the principle of *Cochrane* v. *Rymill*. (1) No doubt in that case the auction took place on the premises of the auctioneer, and not in a private house; but that makes no difference, for even in a private house the auctioneer has a lien on the goods for his charges incident to preparation for the sale; and, consequently, he has possession. The delivery of the goods, therefore, by the defendants to the

(1) 40 L. T. (N.S.) 744.

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purchasers in the ordinary course was a delivery of possession by them. The defendants were not mere negotiators of a contract for the sale of goods, of which the possession remained in their principal, as in the case put by Bramwell, L.J., in *Cochrane* v. *Rymill*, at p. 746. A further distinction between *Cochrane* v. *Rymill* (1) and the present case is, that in the former the auctioneer had advanced money on the goods, and consequently had an interest in the sale; and in the later case of *Turner* v. *Hockey* (2), *Cochrane* v. *Rymill* (1) was distinguished entirely on that ground. But that distinction is immaterial; and *Turner* v. *Hockey* (2) has since been dissented from by Romer, J., in *Barker* v. *Furlong*. (3)

J. A. Foote, for the defendants. There can be no conversion by a person who never had possession. The sale having taken place on Russell's private premises, the goods remained in Russell's possession. There was no bailment of the goods by her to the defendants for the purposes of the sale, as would have been the case if the sale had been in the defendant's own auction-room. But even if the defendants had possession of the furniture, still they are not liable. The case of *Turner* v. *Hockey* (2) is a direct authority for the proposition that an auctioneer, except where he has advanced money on the goods, is not guilty of conversion in selling them for another and delivering them when sold to the purchasers; for in so doing he acts as a mere conduit-pipe. In *National Mercantile Bank* v. *Rymill* (4), the Court of Appeal distinguished the case of *Cochrane* v. *Rymill* (1) from the case before them upon that ground, amongst others.

Lynden Bell, in reply.

Cur. adv. vult.

March 1. COLLINS, J., read the following judgment: This is an action of trover by the grantees under a bill of sale of household furniture and effects against auctioneers who sold the same by order of the grantor, in ignorance of the existence of the bill of sale. Messrs. Curtis & Son, the defendants, received instructions in the ordinary course of business from the grantors to sell

(1) 40 L. T. (N.S.) 744.
(2) 56 L. J. (Q.B.) 301.
(3) [1891] 2 Ch. 173.
(4) 44 L. T. (N.S.) 767.

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the goods in question by auction on the premises, No. 13, Seamoor Road, Westbourne, then in the occupation of the grantor, and which were not the premises where the goods were at the time of the bill of sale. Messrs. Curtis & Son prepared and circulated a catalogue which included not only the goods comprised in the bill of sale, but others belonging to other persons. The sale took place on June 18, 1891, and the goods in question were delivered to purchasers, as was admitted, in the ordinary course. "Ordinary course" was described by a witness called for the defendants—the only one called in the case—all other material facts being admitted between the parties. He was a valuer in the employ of the plaintiffs, and stated that he was very familiar with the course of business at auctions both at public sale-rooms and at private residences, having been obliged to attend at very many of them in his capacity as valuer, and also as having been formerly himself a clerk to an auctioneer, and having himself been charged with the duty of carrying out the delivery to purchasers. I admitted his evidence, subject to an objection from Mr. Foote that he was not competent. His evidence was that it was the duty and practice of the auctioneer in all cases to carry out the delivery, whether the sale takes place at a sale-room or at a private residence; he receives the deposit and the purchase-money, and on receipt gives orders to porters employed by him to assist in or effect the delivery. No delivery can be had without his receipt.

On these facts it was submitted on behalf of the plaintiff that a conversion by the defendants had been proved. On the other hand, Mr. Foote contended, chiefly on the authority of *Turner* v. *Hockey* (1), that what his clients had done did not amount to a conversion. No alternative ground of claim was suggested, and the damages, if any, were agreed at 29*l.* 10*s.* In view of that case, which certainly at first sight seems to go the whole length of the defendants' position, I took time to look more fully into the authorities.

No doubt there is considerable difficulty in framing an exact and exhaustive definition of a conversion, and it is not easy to draw the line at the precise point where a dealing with goods by

(1) 56 L. J. (Q.B.) 301.

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an intermediary becomes a conversion. The difficulty is diminished by remembering that in trover the original possession was by a fiction deemed to be lawful (per Martin, B., in *Burroughes* v. *Bayne* (1), and per Lord Mansfield, C.J., in *Cooper* v. *Chitty*. (2)), and some act had therefore to be shewn constituting a conversion by the defendant of the chattel *to his own use*, some act incompatible with a recognition on his part of the continuous right of the true owner to the dominion over it. All acts, therefore, as suggested by Blackburn, J., in his opinion given to the House of Lords in *Hollins* v. *Fowler* (3), which are consistent with the duty of a mere finder such as the safe guarding by warehousing or asportation for the like purpose, may well be looked upon as entirely compatible with the right of the true owner, and, therefore, as not constituting a conversion by the defendant. It may be, as suggested by Brett, J., in the same case, that the test is whether there is an intent to interfere in any manner with the title of or ownership in the chattel, not merely with the possession. The difficulty is, I think, rather in drawing the true inference from facts in particular cases than in grasping the principle. There are, however, happily many cases which fall clearly on one side or other of the line. It is clear that there can be no conversion by a mere bargain and sale without a transfer of possession. The act, unless in market overt, is merely void, and does not change the property or the possession: *Lancashire Wagon Co.* v. *Fitzhugh* (4), and per Brett, J., in *Fowler* v. *Hollins*. (5) A fortiori, mere intervention as broker or intermediary in a sale by others is not a conversion. This is the case put by Bramwell, L.J., in *Cochrane* v. *Rymill* (6) of an introduction by an auctioneer of a purchaser to a vendor. But, unless *Turner* v. *Hockey* (7) decided the contrary, I should have thought it equally clear that a sale and delivery with intent to pass the property in chattels by a person who is not the true owner and has not got his authority is a conversion.

What, then, is the position of an auctioneer who sells and

(1) 5 H. & N. at p. 301.
(2) 1 Burr. at p. 31.
(3) Law Rep. 7 H. L. 766.
(4) 6 H. & N. 502.
(5) Law Rep. 7 Q. B. at p. 627.
(6) 40 L. T. (N.S.) 744.
(7) 56 L. J. (Q.B.) 301.

delivers in ordinary course? Is he a mere broker who negotiates a sale between two other persons, and then, as suggested by Brett, J., was the case in *Fowler* v. *Hollins* (1), acts only as forwarding agent "without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another," a mere conduit-pipe, as it has been called? In my opinion, an auctioneer who sells and delivers in ordinary course is more than a mere broker or intermediary.

"An auctioneer," says Loughborough in *Williams* v. *Millington* (2), "has a possession coupled with an interest in goods he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction-room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission, and the auction duty which he is bound to pay. In the common course of auctions there is no delivery without actual payment; if it be otherwise the auctioneer gives credit to the vendee entirely at his own risk. Though he is like a factor, therefore, in some instances, in others the case is stronger with him than with a factor, since the law imposes the payment of a duty on him, and the credit in case of a delivery, without the recompense of a commission del credere." In *Fowler* v. *Hollins* (3), Brett, J., in speaking of the new assignment in *Lancashire Wagon Co.* v. *Fitzhugh* (4), which was held to shew a conversion, says: "If it rested only *on a delivery*, as I think it might, it is because the delivery under a sale by a sheriff *or an auctioneer* is a delivery with intent to pass the property, and so more than a simple asportation and delivery." In the same case in the House of Lords, Cleasby, B., at p. 787, says: "How far the intermeddling with the goods themselves by delivering them would do so," i.e., involve responsibility, "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in each case could be regarded as

(1) Law Rep. 7 Q. B. at p. 626.
(2) 1 H. Bl. at p. 84.
(3) Law Rep. 7 Q. B. at p. 630.
(4) 6 H. & N. 502.

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having an independent possession of the goods and delivering for the purpose of passing the property. For example, an auctioneer delivers possession for the purpose of passing the property, and it would not be disputed that he would be liable as upon a conversion to the real owner."

These authorities would seem to dispose of one of Mr. Foote's main arguments, that the auctioneer never had possession, and acted throughout as a mere intermediary between his employer and the purchasers. In this respect he contended that he stood in a better position than the defendant in *Turner* v. *Hockey* (1), who, he pointed out, undoubtedly had possession of the cow which was the subject of the action, and he relied on that case as directly in point. In order to see exactly what that case did decide, it is, I think, necessary to examine the two cases turning on somewhat similar facts which preceded it, viz.: *Cochrane* v. *Rymill* (2), and *National Mercantile Bank* v. *Rymill.* (3)

In *Cochrane* v. *Rymill* (2), the defendant, an auctioneer, had received at his repository certain horses and cabs from one Peggs, with instructions to sell them by auction. The defendant made him an advance on the goods, and afterwards sold them. The goods, in fact, belonged to the plaintiff, to whom Peggs had given a bill of sale; but of this the defendant knew nothing. It was held by the Court of Appeal, affirming Lord Coleridge, C.J., that the defendant was liable for conversion. Bramwell, L.J., however, put the following case as one clearly not constituting a conversion: "What," said he, "if a man were to come into an auctioneer's yard holding a horse by the bridle, and saying, 'I want to sell this horse; will you find me a purchaser?' Then, if the auctioneer says to the bystanders, 'There is a man who wants to sell a horse; will any one buy him?' and some one bought the horse, then there would be no act of conversion on the part of the auctioneer; he would be merely a conduit-pipe; but in this case there is clearly a dealing with the property by the defendant as if he were a person who had the right to dispose of the property." (4)

(1) 56 L. J. (Q.B) 301.
(2) 40 L. T. (N.S.) 744.
(3) 44 L. T. (N.S.) 767.
(4) 27 W. R. at p. 777; S.C. 40 L. T. (N.S.) at p. 746.

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The next case, *National Mercantile Bank* v. *Rymill* (1), was an action of conversion against the same defendant. One, Seaman, had given a bill of sale of certain horses to the plaintiffs. He afterwards sent the horses to the defendant's for sale by auction. The horses were entered in defendant's catalogue. The defendant knew nothing of the bill of sale. Before the auction Seaman sold the horses by private contract to one Townsend. The conditions of sale in the defendant's yard were the same whether horses were sold by auction or by private contract. The purchase-money was paid to the defendant, who deducted his commission and paid the balance to Seaman, and by Seaman's consent gave a delivery order to the purchaser. It was held by the Court of Appeal, overruling Lopes, J., that there was no conversion by the defendant; that the sale was not by him, but by Seaman; and that handing the delivery order to the purchaser at Seaman's request did not carry the case any further.

This decision, which, strange to say, does not appear to be reported elsewhere, seems to me to be one of great importance upon the law of conversion, and to be a long step in the direction which Brett, J., invited the House of Lords to take in *Hollins* v. *Fowler*. (2) The goods were not re-delivered to the bailor, but were delivered to the buyer from the bailor with knowledge of the sale and with the intention of enabling it to be carried out. The defendant quâ the giving the delivery order, seems to have been in exactly the same position as if he had carted the goods at the seller's instance to a railway station for delivery to the buyer under a contract in which he was a mere intermediary, which is precisely the position in which Brett, J., considered the defendants to be in *Fowler* v. *Hollins*. (3) It seems to me, therefore, to be a decision of the Court of Appeal in favour of Brett, J.'s, view as against that of Martin, B., in *Burroughes* v. *Bayne* (4), and *Fowler* v. *Hollins* (5), and also, I think, against the opinion of Blackburn, J., in the same case in the House of Lords: see the illustration given by him (6) of a railway company fixed with

(1) 44 L. T. (N.S.) 767.
(2) Law Rep. 7 H. L. 766.
(3) Law Rep. 7 Q. B. at p. 626.
(4) 5 H. & N. 302.
(5) Law Rep. 7 Q. B. 616.
(6) Law Rep. 7 H. L. at p. 767.

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knowledge that the carriage is not a mere transfer of custody, but for the purpose of transferring the property from a de facto owner to one who was going to use up the goods. The Court, in distinguishing *Cochrane* v. *Rymill* (1), note the fact that the defendant in that case had a lien on the goods for an advance as well as that he effected the sale himself; but, having regard to the authorities, which I have already cited as to the position of an auctioneer, this superadded lien made no difference except as a fact negativing the suggestion that he was a mere agent or "conduit-pipe" in that particular sale. Brett, L.J., clearly thought that had the sale in the case before him been the act of the auctioneer, and not of the parties themselves, he would have been guilty of conversion.

The next case is *Turner* v. *Hockey* (2), of which the head-note is as follows: "An auctioneer who, in the ordinary course of his business, sells by public auction for A. goods ostensibly belonging to A., but really belonging to B., and without notice pays over the proceeds of sale to A., is not guilty of a conversion." The facts as to delivery are not stated; but I infer that delivery was made under the contract. If, therefore, the head-note correctly states the decision, it would be conclusive of this case, and Mr. Foote very properly relied upon it as decisive.

Two points, however, arise upon it. First, does the head-note correctly state the decision? Second, if it does, am I bound to follow it? In my opinion, if delivery under the contract be assumed, the proposition stated in the head-note is not law. It seems to me to be in direct conflict both with principle and with authority. It was questioned by Romer, J., in *Barker* v. *Furlong* (3), and it is observed upon in Messrs. Clerk & Lindsell's valuable treatise on Torts, at p. 171. It was decided as recently as 1887. I should therefore feel at liberty to act on my own judgment. On examining the case, however, I think the head-note goes far beyond the *decision of the Court*, though some of the observations of Day, J., might seem to support it. The facts were as follows: The action was against a cattle salesman for conversion of a cow which was comprised in a bill of sale given

(1) 40 L. T. (N.S.) 744. (2) 56 L. J. (Q.B.) 301.
(3) [1891] 2 Ch. at p. 183.

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by one Phillips to the plaintiff. Phillips took the cow to the market and placed her in the defendant's pen, giving the defendant instructions to sell her. The defendant had notice of the bill of sale. The defendant got an offer of 11*l.* for the cow; *but, instead of selling on his own responsibility, he communicated it to Phillips who accepted it.* The money was paid by the purchaser into the Cattle Exchange Bank to the defendant's account, and paid out to Phillips on an authority given by the defendant, Phillips having paid the defendant a commission of 5*s.* It does not clearly appear, therefore, that the defendant in fact did more than submit an offer; the bargain may have been concluded and the sale effected by Phillips and the purchaser without any further intervention on the part of the defendant, and in this view the case would be exactly within *National Mercantile Bank* v. *Rymill* (1), and Wills, J., seems to have so regarded it, as he treats it as covered by the illustration which I have quoted above, as put by Bramwell, L.J., in *Cochrane* v. *Rymill.* (2) The decision of the Court, therefore, does not support the head-note, and the case is no authority for the now defendant. On the other hand, the decision of Romer, J., above cited, is directly in point, save that there the sale took place in a public room, which, as pointed out in the passage from *Williams* v. *Millington* (3) above cited, can make no difference. On the whole, therefore, I am of opinion that the defendants in this case transferred as far as in them lay the dominion over and property in the goods to the purchasers, in order that they might dispose of them as their own, and my judgment must, therefore, be for the plaintiffs for 29*l.* 10*s.* with costs.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *F. C. Evans.*

Solicitors for defendants: *Peacock & Goddard, for Trevanion, Curtis, & Ridley, Bournemouth.*

(1) 44 L. T. (N.S.) 767. (2) 40 L. T. (N.S.) at p. 746.
(3) 1 H. Bl. at p. 84.

J. F. C.

1892
Jan. 26.

THE QUEEN *v.* HENLEY AND OTHERS.

Justices—Disqualification—Bias—Salmon Fishery Act, 1865 (28 & 29 *Vict.* c. 121), *ss.* 27, 61.

By s. 27, sub-s. 4, of the Salmon Fishery Act, 1865, the board of conservators of a fishery district have power to take legal proceedings against persons violating the provisions of the Salmon Fishery Acts, 1861 and 1865, and by s. 61, "No justice of the peace shall be disqualified from hearing any case arising under the Salmon Fishery Acts, 1861, 1865, or either of them, by reason of his being a conservator or a member of a board of conservators. . . ."

A justice of the peace, who was also a member of the board of conservators of a fishery district, was present at a meeting of the board at which a resolution was unanimously passed to take legal proceedings against a person for violation of certain provisions of the Salmon Fishery Acts; he took no prominent part in the proceedings, but his name appeared as being present at the meeting when the resolution authorizing the water-bailiff to institute the prosecution was passed. The justice afterwards sat with others to hear the charge, and the alleged offender was convicted:—

Held, that the disqualification otherwise attaching to the justice by reason of his having acted as a member of the board at the meeting at which the prosecution was authorized was not removed by s. 61 of the Salmon Fishery Act, 1865, and that the conviction must, therefore, be quashed.

RULE nisi for a certiorari to bring up and quash a conviction. The facts were shortly as follows:—

The board of conservators of the Axe fishery district was a board established under the provisions of the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 27 of which Act empowers a board of conservators to appoint water-bailiffs, and (by sub-s. 4) to take legal proceedings against persons violating the provisions of the Salmon Fishery Acts, 1861 and 1865. In June, 1891, a meeting of the board was held, at which one John Churchill Langdon, who was one of the conservators and was also a justice of the peace, was present, and a resolution was carried unanimously that legal proceedings should be taken against one Small and his servants for fishing in violation of certain provisions in the Acts. Mr. Langdon was not the mover or seconder of the resolution, and did not appear to have taken any prominent part in the proceedings. The resolution was then reduced to writing, and signed by the chairman, the names of all the conservators present, including Mr. Langdon, appearing on the face of such

resolution. An information was accordingly laid by Hutchings, a water-bailiff in the employ of the conservators, and summonses were granted against Small and eleven of his servants. The summonses came on for hearing on July 13, before a bench of magistrates, of whom Mr. Langdon was one, and in the result Small was fined ten shillings, and the summonses against his servants dismissed. No objection was taken to the presence of Mr. Langdon on the bench, although, in order to prove the authority of the water-bailiff to institute the proceedings (1), the above-mentioned resolution of the conservators was put in, and the name of Mr. Langdon as appearing thereon might have been seen by the defendant or his solicitor. The alleged offence was not committed on Mr. Langdon's land.

By s. 61 of the Salmon Fishery Act, 1865, "no justice of the peace shall be disqualified from hearing any case under the Salmon Fishery Acts, 1861, 1865, or either of them, by reason of his being a conservator or a member of a board of conservators . . . . provided that no justice shall be entitled to hear any case in respect of an offence committed on his own land."

W. Howland Roberts, for the justices, shewed cause. The justice was not disqualified from acting, the effect of s. 61 being to expressly remove a disqualification that might otherwise have existed. It is true that in *Reg.* v. *Lee* (2) it was held that s. 258 of the Public Health Act, 1875, which is a somewhat analogous section, did not operate to remove the disqualification attaching to a justice by reason of his having acted as a member of the sanitary committee of a borough in directing the prosecution; but that case is distinguishable, for s. 61 of the Salmon Fishery Act is much fuller and more general in its language than s. 258 of the Public Health Act, and expressly provides for one disqualification, viz., the ownership of the land on which the offence is committed, thus impliedly excluding other disqualifications. Moreover, under the Public Health Act any person aggrieved may prosecute; whereas under the Salmon Fishery Acts the board of conservators is the only possible prosecutor; the water

(1) See *Anderson* v. *Hamlin*, 25 Q. B. D. 221. (2) 9 Q. B. D. 394.

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bailiff can do nothing without the specific authority of the conservators in each particular case. It is clear that a bare interest in the penalty is no disqualification, for by s. 62 it is provided that the penalties shall be paid to the board. *Reg.* v. *Handsley* (1) shews that, in order to disqualify, there must be a likelihood of a real, substantial bias, and there was none in the present case. Further, assuming that the justice was improperly present, there was consent to the jurisdiction; for it must be assumed that either the defendant or his solicitor before the justices knew of the objection at the time of the hearing: *Reg.* v. *Justices of Surrey.* (2)

C. W. Mathews, for the conservators.

Crump, Q.C., and *Hextall*, in support of the rule, were not called upon to argue, but referred to *Reg.* v. *Milledge* (3); *Reg.* v. *Gaisford.* (4)

LAWRANCE, J. I am of opinion that this rule must be made absolute. The question we have to determine is whether a justice, who was a member of the board of conservators and was present when the resolution for the prosecution of the defendant was passed and voted for that resolution, was disqualified from sitting as a justice upon the hearing of the summons, or whether his disqualification was removed by virtue of the provisions of s. 61 of the Salmon Fishery Act, 1865. The cases are very strong as to the principle which ought to guide persons acting as justices, and they shew most clearly that, if there is any danger of a substantial bias likely even unconsciously to influence a justice, he ought not to sit, and it is unnecessary for me to refer to more than the very clear language of Mellor, J., in *Reg.* v. *Allan* (5), that "it is exceedingly desirable that justice should be administered by persons who could not be suspected of any, even indirectly, interested motive." No one can suppose that in the present case the justice was really influenced by any interested motive, direct or indirect; he believed himself to be amply justified in the course he took by the provisions of s. 61.

(1) 8 Q. B. D. 383.
(2) 8 Cox C. C. 314.
(3) 4 Q. B. D. 332.
(4) Ante, p. 381.
(5) 4 B. & S. 915; 33 L. J. (M.C.) 98.

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I am clearly of opinion, however, that that section does not operate to remove his disqualification: all it does is to provide that a justice shall not be disqualified from acting as a justice merely by reason of the fact that he is a member of a board of conservators; it does not authorize him to take part as a member of the board in directing a prosecution to be instituted against a particular individual, and afterwards to act as a justice and hear and determine the very prosecution that he (with others) has already ordered to be instituted.

WRIGHT, J. I am of the same opinion. The case of *Reg* v. *Lee* (1) is absolutely in point. As to what amounts to a waiver of the objection or acquiescence in the jurisdiction I express no opinion; the affidavits would seem to shew that the objection was not known at the time to the defendant or his solicitor.

Rule absolute.

Solicitors for prosecutor: *Ford & Ford, for Wansbrough & Robinson, Bristol.*

Solicitor for justices and for conservators: *Tweed, Honiton.*

W. J. B.

[IN THE COURT OF APPEAL.]

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Feb. 23.

DUNLOP & SONS *v.* BALFOUR, WILLIAMSON & CO.

Ship—Charterparty—Cesser Clause—Charterer's Liability to cease on Completion of Loading—Lien for Demurrage—Damages for Detention at Port of Loading.

By a charterparty all liability of the charterer was to cease on completion of loading, provided the value of the cargo was sufficient to satisfy the lien, which was thereby given for (inter alia) demurrage under the charterparty. The ship was to be loaded as customary, and to be discharged as customary at the average rate of not less than 100 tons per working day, from the time she was in berth and ready to discharge, and notice thereof given by the master in writing. Demurrage to be at the rate of 20*l.* per day. In an action by the owner to recover from the charterer damages for detention at the port of loading:—

Held (affirming the judgment of the Queen's Bench Division), that the

(1) 9 Q. B. D. 394.

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word "demurrage" in the lien clause did not cover damages for undue detention at the port of loading, and that, therefore, the cesser clause did not exempt the charterer from liability for the delay.

ARGUMENT of a point of law raised on the pleadings in an action by shipowners against charterers to recover damages for detention of the ship at the port of loading. The plaintiffs claimed 600*l.* damages for thirty days' detention.

The material clauses of the charterparty were as follows:—

"All liability of charterers to cease on completion of loading, provided the value of the cargo is sufficient to satisfy the lien, which is hereby given for all freight, dead freight, demurrage, and average (if any) under this charterparty . . . . to be loaded as customary, and to be discharged as customary at the average rate of not less than 100 tons per working day (Sundays and legal holidays excepted), from the time the ship is in berth and ready to discharge, and notice thereof given by the master in writing. Demurrage to be at the rate of 20*l.* per day."

1892. Jan. 11. *Bigham, Q.C.*, and *Carver*, for the defendants. This is a claim for demurrage, for which a lien is given. The lien applies to damages for detention at the port of loading as well as at the port of discharge, and therefore the remedy now sought to be enforced is excluded. *Clink* v. *Radford* (1) is distinguishable, because there the words were "*or* charterers to pay demurrage," whereas in the present case the word "*or*" is omitted.

Gorell Barnes, Q.C. (*Leck*, with him), for the plaintiffs. The case is concluded in the plaintiffs' favour by *Lockhart* v. *Falk* (2) and *Clink* v. *Radford*. (1)

Carver, replied.

[The following authorities were also referred to: *Oglesby* v. *Yglesias* (3); *Milvain* v. *Perez* (4); *Bannister* v. *Breslauer* (5); *Gray* v. *Carr* (6); *Christoffersen* v. *Hansen* (7); *Francesco* v.

(1) [1891] 1 Q. B. 625.
(2) Law Rep. 10 Ex. 132.
(3) E. B. & E. 930; 27 L. J. (Q.B.) 356.
(4) 3 E. & E. 495; 30 L. J. (Q.B.) 90.
(5) Law Rep. 2 C. P. 497.
(6) Law Rep. 6 Q. B. 522.
(7) Law Rep. 7 Q. B. 509.

Massey (1); *Kish* v. *Cory* (2); *Sanguinetti* v. *Pacific Steam Navigation Co.* (3); *French* v. *Gerber.* (4)]

Cur. adv. vult.

1892. Jan. 29. The following judgments were delivered:—

LAWRANCE, J. The question raised in this case turns on the cesser clause of a charterparty entered into between the plaintiffs, the owners of a ship called the *Clan Mackenzie*, and the defendants, who were the charterers. The question arises in an action brought by the plaintiffs against the defendants for damages for detention of the ship at the port of loading. The defence to that claim is that the defendants were relieved from liability by the cesser clause of the charterparty. The question is one which has been raised on many occasions, and our attention was called to a great number of cases, some of them apparently contradictory, and the difficulty has been to find the principle which underlies the cases. There are, however, three which have been decided, one as far back as 1875: *Lockhart* v. *Falk* (5); *Clink* v. *Radford* (6) decided in 1891, and a Scotch case (7) decided in 1889, which, in my judgment, are undistinguishable from the present case. Now, the principle or the rule that underlies the decision in those cases appears to be this, to use the words of the learned judges in the case of *Clink* v. *Radford* (6), that the lien must be commensurate with the release of liability. This is expressed by Fry, L.J., thus: "The rule that we are primâ facie to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read if possible as co-extensive." (8) That was what was said in the same case, although in other language, by the Master of the Rolls. He says: "The question in this particular case, as in every other case, will depend upon this, whether if we apply the cesser clause to the particular breach complained of, and so hold the charterer to be free, the ship-

(1) Law Rep. 8 Ex. 101.
(2) Law Rep. 10 Q. B. 553.
(3) 2 Q. B. D. 238.
(4) 1 C. P. D. 737; 2 C. P. D. 247.
(5) Law Rep. 10 Ex. 132.
(6) [1891] 1 Q. B. 625.
(7) *Gardiner* v. *Macfarlane*, 16 Court Sess. Cas. 4th Series, 658.
(8) [1891] 1 Q. B. at p. 632.

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owner has any remedy for his loss. If he has, we should construe the cesser clause in its fullest possible meaning, and say that the charterer is released; but if we find that by so construing it the shipowner would be left without any remedy whatever for the breach, then we should say that it could not have been the meaning of the parties that the cesser clause should apply to such a breach." (1) Primâ facie, that is the way a cesser clause in a charterparty is to be read.

In this charterparty there are no words with regard to demurrage at the port of loading, there is no time at which any such demurrage is to be charged, and there is no sum which is to be attributable to it; but when reference is made to the port of discharge, the time is mentioned and the average rate at which the discharge is to take place from the time the ship is at her berth ready to discharge, and the rate of demurrage, and it is thus easy to calculate the sum payable. On this arises the question, What is the meaning of the word "demurrage" in a case of this kind? The principle I extract from the cases is, that "demurrage," as used in this charterparty, does not include damages for detention at the port of loading. One case, which was relied upon by the defendants—*Bannister* v. *Breslauer* (2)—has been often commented upon, although never reversed. The point in that case was whether a lien was given for demurrage; but no demurrage was pointed at either at the port of loading or at the port of discharge, and in order to give full effect to the words of the charterparty it was held that demurrage did include detention at the port of loading. It does not seem to me that it can be baldly stated that that case is an authority for the broad proposition that demurrage includes damages for detention at the port of loading. The judgment of Bowen, L.J., in *Clink* v. *Radford* (3) deals with that. He says: "If *Bannister* v. *Breslauer* (2) is to be supported at all, it must be upon the ground that no other meaning can be given to the word 'demurrage' in that charterparty, and no other extent to the lien to be created, than by including in the word 'demurrage' damages for detention at the port of loading, so that such damages are covered by

(1) [1891] 1 Q. B. at pp. 627, 628. (2) Law Rep. 2 C. P. 497.
(3) [1891] 1 Q. B. 625.

the lien." Then he also says, in the same judgment: "So far as I know, all the cases, with the exception of *Bannister* v. *Breslauer* (1), where a lien has been held to cover damages for detention of a ship, are cases in which one can either directly or indirectly find in the charterparty some practical pecuniary measure by which the damages for such delay can be measured." (2) *Clink* v. *Radford* (3) seems to me to follow *Lockhart* v. *Falk* (4), which has also been followed in *Gardiner* v. *Macfarlane* (5), in which the same principle was involved and the same conclusion arrived at.

Under the circumstances and for these reasons the conclusion I arrive at is that the plaintiffs are entitled to judgment.

WRIGHT, J. (after reading the clauses of the charterparty, continued). It is unnecessary to recapitulate in detail the numerous cases, from *Pederson* v. *Lotinga* (6), 1857, to *Clink* v. *Radford* (3), in 1891, in which clauses more or less similar have been considered. The effect of them seems to be as follows:—

In the first place the terms of the particular cesser clause are to be examined. If they are free from ambiguity, it can rarely happen that their effect can be altered by any other provision of the charterparty. Examples are *Oglesby* v. *Yglesias* (7), and *Milvain* v. *Perez* (8), where the cesser clause in express terms exempted the charterer from liability in respect of all matters and things before, during, or after the shipping of the cargo. If the cesser clause is expressly restricted to certain liabilities only, effect is given to it subject to the restriction, as in *Lister* v. *Van Haansbergen.* (9)

The general principle is clearly stated in *French* v. *Gerber.* (10)

But it more usually happens that the cesser clause is ambiguous. For instance, where, as is commonly the case, the clause runs, "All liability of the charterer to cease on completion of loading," or, "all liability of the charterer under this charter-

(1) Law Rep. 2 C. P. 497.
(2) [1891] 1 Q. B. at p. 631.
(3) [1891] 1 Q. B. 625.
(4) Law Rep. 10 Ex. 132.
(5) 16 Court Sess. Cas. 4th Series, 658.
(6) 28 L. T. 267.
(7) E. B. & E. 930; 27 L. J. (Q.B.) 356.
(8) 3 E. & E. 495; 30 L. J. (Q.B.) 90.
(9) 1 Q. B. D. 269.
(10) 1 C. P. D. 737; 2 C. P. D. 247.

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party to cease on completion of loading," or to the like effect, it may be doubtful whether the intention is to exempt the charterer from liabilities accrued before the completion of loading, or only to prevent the accruing of future liabilities, and further, in either case, whether it is to exempt him only from such matters as agreed freight, dead freight, or demurrage or average, or is also to exempt him from liability to be sued for any unliquidated damages.

In such cases it may happen that the charterparty does not contain any lien clause or other clause from which help can be got; and then certain presumptions may be made. There is a presumption against an intention by the shipowner that any causes of action accrued before the loading shall be released, or, what is the same thing, that his right to sue for them shall be deemed contingent on a sufficient cargo not being loaded, and a presumption against an intention by the shipowner to leave himself wholly without remedy for unliquidated damages in respect of breaches before the completion of loading: *Christoffersen* v. *Hansen* (1), per Brett, J., and Bramwell, B., in *Gray* v. *Carr* (2), and *Clink* v. *Radford* (3); but this latter presumption does not extend to liability for unliquidated damages incurred after loading. As to these, the cesser clause in the ordinary form is absolute, whether or not a lien is given: *French* v. *Gerber*. (4) There rarely is any other clause in the charterparty which throws material light upon the meaning of the cesser clause, except the lien clause, which is most commonly to the effect that the shipowner is to have a lien on the cargo for freight, dead freight, and demurrage. Where there is such a clause there is a strong presumption that to the same extent to which the shipowner obtains a remedy by the lien he consents to discharge the charterer from liability to action; and also a strong presumption that he does not intend to discharge the charterer from any liability for breaches before loading to which the lien does not extend; and the question what is the proper construction of the cesser clause tends to become the question, what is the proper construc-

(1) Law Rep. 7 Q. B. 509.
(2) Law Rep. 6 Q. B. 522, at pp. 537, 548.
(3) [1891] 1 Q. B. 625.
(4) 1 C. P. D. 737; 2 C. P. D. 247.

tion of the lien clause: *Francesco* v. *Massey* (1); *Kish* v. *Cory* (2); *French* v. *Gerber* (3); *Gardiner* v. *Macfarlane* (4); *Clink* v. *Radford*. (5)

In the construction of the lien clause for this purpose, certain other rules or presumptions have been established. If the charterparty contains a provision for demurrage in the form of giving the charterer a right to detain the ship for a specified number of days beyond the lay days at an agreed rate per day, either at the loading port or at the port of discharge or both, then the lien clause in its ordinary form extends to all demurrage of this kind, as in *Francesco* v. *Massey*. (1) It is equally clear that in such a case it does not extend to mere detention of a kind for which no demurrage rate is fixed. It may be added with regard to a demurrage clause in this form, that if the charterparty specifies a number of days for loading and also a number of days for discharging, and then a number of days on demurrage, this provision for demurrage has been held to refer to both ports: *Kish* v. *Cory* (2); and it was so assumed in *Francesco* v. *Massey*. (1)

If the charterparty contains no provision for a fixed number of demurrage days in the first form, but contains a provision for demurrage in the form of fixing a demurrage rate, that is, an agreed rate of payment for detention at one or both ports, without any express limit, then the lien extends to this kind of demurrage, and not to any other damages for detention, and the latter clause consequently is construed to exempt the charterer from liability for that demurrage, but not from liability for unliquidated damages for detention at the loading port. This appears to be clearly settled by *Lockhart* v. *Falk* (6); *French* v. *Gerber* (3); *Sanguinetti* v. *Pacific Steam Navigation Co.* (7); *Gardiner* v. *Macfarlane* (4); *Clink* v. *Radford* (5); notwithstanding expressions to the contrary effect in *Kish* v. *Cory* (2), and in *Sanguinetti* v. *Pacific Steam Navigation Co.* (7), and in *Restitution Steamship Co.* v. *Pirie*. (8)

(1) Law Rep. 8 Ex. 101.
(2) Law Rep. 10 Q. B. 553.
(3) 1 C. P. D. 737; 2 C. P. D. 247.
(4) 16 Court Sess. Cas. 4th Series, 658.
(5) [1891] 1 Q. B. 625.
(6) Law Rep. 10 Ex. 132.
(7) 2 Q. B. D. 238.
(8) 61 L. T. (N.S.) 330; affirmed in the Court of Appeal, 64 L. T. (N.S.) 491, n.

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If, as in *Kish* v. *Cory* (1), the charterparty contains a demurrage clause in the first form, specifying a number of days, and also a provision for a demurrage rate for further detention at the loading port without limit of time, it does not appear to be clear whether the lien and cesser clauses will be held to extend to the latter: see per Brett, L.J., in *Sanguinetti* v. *Pacific Steam Navigation Co.* (2) The facts in *Kish* v. *Cory* (1) did not raise this question.

If the charterparty contains no clause expressly providing for demurrage in either form, it has not yet been definitively settled whether the word "demurrage" in the lien clause extends to the liability to unliquidated damages for detention at the port of loading. In *Bannister* v. *Breslauer* (3) the Court thought that it does so, on the ground that otherwise no effect would be given to the word "demurrage"; but this view has been questioned, especially by the present Master of the Rolls. As is pointed out in *Gray* v. *Carr* (4), from the mere existence of a general word in a general printed form of a mercantile document, which is intended to be filled in or modified as the particular transaction requires, it is not necessarily to be implied that any effect must be given to that word. The proper construction may be to read in after such a word the qualification "if any," which in the present case is used, and may be construed to refer to demurrage as well as to average.

It remains to apply these rules to the present case. The cesser clause is free from ambiguity as regards liabilities which might have been incurred after the completion of loading. As to all these there is a complete exemption of the charterer, even in respect of unliquidated damages for which no lien is given to the shipowner: *French* v. *Gerber*. (5) But as regards liabilities accrued before completion of loading the cesser clause is ambiguous, and if it stood alone the presumption would be that it does not deprive the shipowner of his accrued right of action against the charterer for unliquidated damages for detention before a sufficient cargo was loaded. But there is a lien clause

(1) Law Rep. 10 Q. B. 553.
(2) 2 Q. B. D. at p. 251.
(3) Law Rep. 2 C. P. 497.
(4) Law Rep. 6 Q. B. 522.
(5) 1 C. P. D. 737; 2 C. P. D. 247.

for demurrage, and also a clause for payment of a demurrage rate in the second form. The lien clause therefore extends to this demurrage, and the presumption against the application of the cesser clause is therefore reversed, and the charterer is to be held exempt from liability for such detention as is governed by the demurrage and lien clauses; and the only question is whether this demurrage clause does extend to detention at the port of loading. *Lockhart* v. *Falk* (1) seems to be an express authority that it does not; and that case was cited and not disapproved in the Exchequer Chamber in *Kish* v. *Cory* (2), and in *Sanguinetti* v. *Pacific Steam Navigation Co.* (3), and was approved and followed by the Appellate Court in Scotland in *Gardiner* v. *Macfarlane* (4), and was approved by Bowen, L.J., in *Clink* v. *Radford.* (5) The only distinction between *Lockhart* v. *Falk* (1) and the present case is that in *Lockhart* v. *Falk* (1) a specified number of lay days was allowed for discharge; whereas in the present case the stipulation is that the ship is to be discharged at the average rate of not less than 100 tons per working day. Whether for all purposes the two provisions are equivalent need not be determined. In *Sanguinetti* v. *Pacific Steam Navigation Co.* (3), Mellish, L.J., and Brett, L.J., do not seem to have entirely agreed on a similar question. But for the present purpose there does not appear to be any sufficient ground of distinction. When the loading is complete it is a simple matter of computation to find the number of days. The result, therefore, is that in relation to the port of discharge there is in effect a specified number of days to which the demurrage rate is easily applicable, so that all concerned can know without difficulty the amount for which a lien attaches; whereas in relation to the loading port there is no similar definition, and it might be impossible to ascertain the amount for which a lien could be claimed on the cargo without an inquiry into the usages, appliances, and accommodation of the loading port, and all the circumstances on which the question of due diligence in loading or the amount of damages may depend. In *Gardiner* v.

(1) Law Rep. 10 Ex. 132.
(2) Law Rep. 10 Q. B. 553.
(3) 2 Q. B. D. 238.
(4) 16 Court Sess. Cas. 4th Series, 658.
(5) [1891] 1 Q. B. 625.

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Macfarlane (1) the damages claimed included damages for the fouling of the ship's bottom during the detention at the loading port, and, as is pointed out by the present Master of the Rolls in *Gray* v. *Carr* (2), the negotiability of bills of lading would be seriously affected if their value depended on liabilities of such a kind. There is, therefore, a strong practical reason for holding that the lien was not intended to be given for detention at the loading port, and for arguing back to the conclusion that the demurrage rate was not intended to apply to such detention. In one respect, the facts in *Lockhart* v. *Falk* (3) were less favourable to the shipowners' claim against the charterer than the facts in the present case.

In *Lockhart* v. *Falk* (3) it was proved at the trial that there was a customary rate of loading at the loading port, and, therefore, the force of the considerations last mentioned was less than in this case.

The plaintiffs are entitled to maintain this action against the defendants for such damages as they can prove without reference to the demurrage rate, which is agreed only with reference to the port of discharge.

Judgment for plaintiffs.

P. B. H.

The defendants appealed.

1892. Feb. 23. *Bigham, Q.C.*, and *Carver*, in support of the appeal. The question is whether the cesser clause in this charterparty protects the defendants from liability in respect of undue detention of the ship at the port of loading. It must be admitted that the authorities shew that a cesser clause like that in question must be interpreted with reference to the extent of the lien given to the shipowners; and that, unless the lien given against the cargo covers detention at the port of loading, the cesser clause will not protect the defendants. Here provision is made by the charterparty for what is called demurrage, and a lien is given for all demurrage. It is contended that "demurrage" in this charterparty is applicable to compensation for delay in loading as well as discharging the ship. There is no

(1) 16 Court Sess. Cas. 4th Series, 658.

(2) Law Rep. 6 Q. B. 522.

(3) Law Rep. 10 Ex. 132.

provision in the charterparty for demurrage properly so called, either at the port of loading or the port of discharge—that is to say, there is no provision for a certain number of lay days and then for demurrage days during which the charterers are entitled to detain the ship on payment of so much per day. The term "demurrage" is used in the secondary sense which it has acquired in business, viz., as meaning compensation or agreed damages for detention at so much a day. There is no reason why this should not apply to the port of loading as much as to the port of discharge. No time is mentioned within which the ship is to be loaded. Therefore, the construction must be that a reasonable time is meant. The unloading is to be at the rate of 100 tons per day; but that is subject to various uncertain contingencies; and really there would be no greater difficulty in ascertaining when demurrage would commence in one case than in the other. There is no reason in the nature of things why the word "demurrage" as used in this charterparty should not be read as applying to detention at the port of loading. It must be admitted that the case of *Lockhart* v. *Falk* (1) is somewhat against the defendants' contention. The charterparty there was in very similar terms to that now in question. But it appears from the report of that case in 33 L. T. (N.S.) 96 that the provisions as to loading and unloading were not in the charterparty in that case coupled together in the same sentence immediately followed by the provision as to demurrage, as in this case. If that case is not distinguishable from the present on the terms of the charterparty, it is submitted that it was wrongly decided and should be overruled.

The interpretation of the charterparty in that case, to the effect that the demurrage rate clause did not apply to the port of loading has not been dealt with in any subsequent case, though the other propositions, that if it did not apply, then the lien did not apply to detention at the port of loading, and so the cesser clause did not operate, have been approved. The first question did not arise in *Gardiner* v. *Macfarlane* (2), nor in *Clink* v. *Radford*. (3)

(1) Law Rep. 10 Ex. 132. (2) 16 Court Sess. Cas. 4th Series, 658.
(3) [1891] 1 Q. B. 625.

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Gorell Barnes, Q.C., and *Leck*, contrà, were not called on.

LORD ESHER, M.R. If I had to construe for the first time the particular part of this charterparty which is in question, I should do so in precisely the same way as I am about to construe it after the meaning has been determined by decisions. It is a wholesome rule that has been often laid down, that when a well-known document has been in constant use for a number of years, the Court, in construing it, should not break away from previous decisions, even if in the first instance they would have taken a different view, because all the documents made after the meaning of one has been judicially determined are taken to have been made on the faith of the rule so laid down. If, then, *Lockhart* v. *Falk* (1) is a case like the present one, and cannot be distinguished from it, we ought not to overrule that decision, even if we should not have arrived at the same conclusion had the case come before us for the first time.

Let us consider what has been decided bearing on the point before us. In *Lockhart* v. *Falk* (1) the phrase used in the charterparty as to the loading of the ship was that it was to be "in the customary manner," and, as I understand the decision, the Court said that a breach of that clause did not give rise to anything in the nature of demurrage, but that the clause applied to the manner of loading only. That decision was arrived at after *Lawson* v. *Burness* (2) had been cited to the Court; but they decided: "We do not think we can read the words that the vessel shall load in the customary manner as equivalent to a provision that she shall load in a certain number of days, or at a certain rate per day, for the purpose of applying the word 'demurrage' to a detention beyond that period." The clause, therefore, does not apply to the time to be taken in loading, or to the penalty for not loading in the given time, but only to the manner of loading. But then there is a contract to load the ship and no time fixed for loading, and a term of the contract must be implied to load in a reasonable time, not arising from the words "in the customary manner," but from the contract to load. In such a case, what are the damages for breach of the contract?

(1) Law Rep. 10 Ex. 132. (2) 1 H. & C. 396.

No amount has been fixed, and they must be damages at large depending on the loss to the shipowner from the vessel not being loaded in due time. Can such damages be brought within the term "demurrage"—demurrage to which a lien may attach? One reason against it is that the person affected by the lien ought to be able to get rid of it by tendering the proper sum; but if he cannot ascertain what that sum is, he cannot make a tender. If there were nothing else in the charterparty to which the word demurrage would be applicable, it may be—though I do not say it would be—that the Court would then be obliged to say that the lien for demurrage must apply to such uncalculated damages. But there is in the charterparty a matter to which the lien can apply, and it cannot be a proper mode of construction to say that, where there is that to which the lien can fitly apply it is also to be applicable to something to which in ordinary circumstances it would not be applicable. I have no doubt this view is borne out by the decision in *Lockhart* v. *Falk* (1), and that *Clink* v. *Radford* (2) is to the same effect, not merely as laying down a rule on the facts of that case, but as laying down a general rule for the construction of such charterparties. It was clearer in that case than in the present that the penalty clause applied only at the port of discharge; but the case laid down a general rule, that where there is a stipulation which gives a penalty or payment at the port of discharge in the nature of demurrage, and none at the port of loading, the lien clause for demurrage must be applicable to the former and not to the latter. I will only add that the making of such an agreement between the shipowner and the charterer is easily explained by the usual course of business with regard to loading and unloading cargoes. The control in the former case is in the charterer, and it would not be a business view of the matter that he should ask for a cesser of his liability in respect of acts which are his and his only. At the port of discharge quite a different state of things exists. The unloading is generally the joint act of the owner and the consignee, and the discharge is consequently governed by the acts of persons over whom the charterer has no control; so that it would not be right to give a remedy against the charterer for delay incurred during the discharge. The

(1) Law Rep. 10 Ex. 132. (2) [1891] 1 Q. B. 625.

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business view of the transaction and the authoritative view of the construction of the charterparty are thus at one.

In this view of the case the lien applies only where delay arises at the port of discharge, and, therefore, the cesser clause does not protect the defendants. The judgment appealed from was right, and the appeal will be dismissed.

FRY, L.J. The question we have to decide arises on a clause in a charterparty providing for cesser of the liability of the charterer, and giving a lien to the shipowner for, among other things, demurrage. The charterparty must be construed so as to make the application of the cesser and lien clauses co-extensive, and the question is whether the lien for demurrage applies to unreasonable detention at the port of loading. The clause obviously divides itself into two parts. The first of these relates to the loading of the ship, which is to be "as customary," which has been held to be equivalent to saying "in the customary manner." In this clause nothing is said as to the time within which the loading is to be effected; and in this particular case the absence of a reference to time is more marked than usual, because the first part of the clause is followed by another clause containing words limiting the time for unloading; so that it is obvious that this interpretation of the words "as customary" is applicable to this case. This part of the clause then is silent as to time, and leaves the loading to be done in a reasonable time.

The clause as to discharge stipulates for the mode and time of unloading by fixing the time from which the period of discharge is to be computed, namely, when the ship is in berth and ready to discharge, and notice has been given by the master in writing. The speed at which the ship is to be unloaded is fixed at the average rate of not less than 100 tons a day. There is thus a terminus a quo and a rate of unloading, and the time at which the unloading should be completed is fixed.

In my opinion demurrage is more applicable to a delay after a time expressly fixed, than to a delay after a time which is only implied as reasonable. That rule underlies the construction put on a similar clause in *Lockhart* v. *Falk* (1), and is, in my opinion,

(1) Law Rep. 10 Ex. 132.

a reasonable one. If this is the correct view, the words as to demurrage in this charterparty relate only to the port of discharge. Two arguments have been addressed to us against this view. First, it is said this case and *Lockhart* v. *Falk* (1) are different, because the words used in the two charterparties are different. It is true that the charterparties differ in some respects. In the former case the time given for unloading is ten working days; while in this charterparty the time is determined by an average discharge of not less than 100 tons per working day. It is true, also, that in the former case the clause as to loading was separated from the clause as to discharging; whereas in the present case the loading and discharging are dealt with in the same clause. In my view, these differences are immaterial, and the principle of construction laid down in the former case applies to that now before us. Then, it is said that *Lockhart* v. *Falk* (1) was wrongly decided; but I think, for the reasons I have given, that it was a right decision. Therefore, upon authority as well as principle, the judgment of the Divisional Court was, in my opinion, right, as the words of the lien clause cover delay at the port of discharge, and not unreasonable detention at the port of loading.

LOPES, L.J. If I were considering the construction of this charterparty unassisted by authority, I should come to the conclusion that the lien for demurrage applies only at the port of discharge. The authorities are favourable to this construction, and I am unable to distinguish the case of *Lockhart* v. *Falk* (1) from the present case. It is said that decision is wrong; but with that I do not agree; and further, it would be a strong thing, where a decision has been standing for sixteen years, for this Court to overrule it. I will only add, that it is abundantly clear that not only do the authorities favour this construction, but that it is entirely in accord with the business view of the matter.

Appeal dismissed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Rowcliffes, Rawle & Co., for Hill, Dickenson & Co., Liverpool.*

(1) Law Rep. 10 Ex. 132.

A. M.

C. A.

1892

Jan. 29.

[IN THE COURT OF APPEAL.]

IN RE SHINE. EX PARTE SHINE.

Bankruptcy—Property of Bankrupt—"Salary or income"—Appropriation of Bankrupt's salary or income for Creditors—"Receipt of salary or income"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 53, 54.

Sect. 53, sub-s. 2, of the Bankruptcy Act, 1883, enables the Court, when a bankrupt is in the receipt of a salary or income, to order it, or any part thereof, to be paid to the trustee in the bankruptcy, to be applied by him as the Court may direct:—

Held, that salary or income payable to a bankrupt under an agreement in respect of his personal services, is not "property of the bankrupt" which vests in the trustee in the bankruptcy under s. 54 of the Act, and that, consequently, notwithstanding the making of a receiving order against him, the bankrupt is competent to make any arrangement which he pleases with regard to such salary or income, so long as no order for its application has been made under s. 53, sub-s. 2, and that such an order when made cannot affect the validity of a prior arrangement as to the salary or income entered into by the bankrupt.

An actor entered into an agreement with the manager of a theatre to act at a specified theatre, or any other theatre, for a term of two years, at a salary of 30*l.* a week, payable weekly. The salary was to be subject to a proportionate reduction in respect of any night upon which the theatre should not be open. A receiving order in bankruptcy having been made against the actor, he entered into an arrangement with the manager that the manager should buy up his debts and should reimburse himself by retaining 20*l.* a week out of the bankrupt's salary. The creditors were to be paid by means of shares in a company, and they did not all avail themselves of the arrangement:—

Held, that the payment to the bankrupt for his services under the first agreement was "salary or income" within the meaning of s. 53, sub-s. 2, but that the second agreement with the manager was valid, notwithstanding the receiving order.

APPEAL against an order that a part of the salary or income of J. L. Shine, a bankrupt, should be paid to the trustee in the bankruptcy for the benefit of the bankrupt's creditors.

The bankrupt was a comedian. On June 4, 1891, he entered into an agreement in writing with Sir Augustus Harris, the manager of the Theatre Royal, Drury Lane. This agreement, in which Sir Augustus Harris was called "the manager," and the bankrupt was called "the artiste," contained (inter alia) the following clauses:—

"The manager engages the artiste at a salary of 22*l.* 10*s.* per week, to include six performances, and a further salary equal to

one-twelfth of the said sum of 22*l.* 10*s.* for each additional morning performance, according to the custom of playhouse pay, that is, for such days and nights only as the said theatre shall be open for theatrical performances under the management of the manager; the artiste to rehearse and perform to the best of his skill and ability at the said theatre, or any other theatre or place of amusement, as often as he shall be warned to do so by the manager, or any other person or persons duly authorized by him on his behalf (all such persons being included in the term 'the management' hereinafter used), or by notice in the bills of the day or newspapers.

"This engagement shall commence on the 20th July, 1891, and shall continue in force for a period of two years, forty-four weeks guaranteed in each year, at such time or times as Mr. Harris may desire. Should Mr. Shine be called upon to play out of London his salary shall be 30*l.* weekly.

"The annexed rules and regulations shall be taken to be incorporated with and form part of this agreement, and shall be binding upon the artiste."

Among the rules and regulations annexed to the agreement were the following:—

"10. Every person engaged at this theatre, as a performer or otherwise, will be paid weekly according to the usual mode of playhouse payment.

"11. No performer or other person engaged or employed at this theatre shall be entitled to be paid for any day or days on which the theatre is not open for theatrical performances."

On July 23, 1891, a receiving order in bankruptcy was made against Shine, and on August 23, 1891, he was adjudicated a bankrupt, and the official receiver thereupon became the trustee of his property.

On September 10, 1891, the official receiver gave notice of an application to the Court, under s. 53 of the Bankruptcy Act, 1883, for an order setting aside a portion of the bankrupt's salary for the benefit of his creditors. At this time the bankrupt was engaged in performing with a company under the management of Sir A. Harris out of London. This tour was to end on December 17. In answer to this application the bankrupt made

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an affidavit, in which he said: "I was, prior to the receiving order, engaged by Sir A. Harris to take part in a touring company, which will come to an end on the 17th December, 1891. Under the terms of my engagement I receive as remuneration for my services £5 per performance, payable at the end of each week. If the theatre should be closed, or through illness or any other cause whatsoever I should be prevented from performing, or decline to perform, then on each and every such occasion I am not entitled to any remuneration. Sir A. Harris and myself are at liberty to put an end to such engagement by giving a day's notice. Shortly after the date of the receiving order Sir A. Harris offered to buy up the debts due to my various creditors if I could arrange with them to take shares in a certain company, or could realize such shares. The conditions upon which such offer was made were, that my solicitors should purchase the debts and hold them upon trust for Sir A. Harris, until he had been repaid the amount to be so found by him. During the remainder of the before-mentioned tour, if I continued with his company and attended every performance, it was agreed that Sir A. Harris should deduct the sum of £20 per week from the amount payable to me on account of the moneys to be so paid by him as aforesaid. It was also further agreed that, in the event of my leaving his company and performing elsewhere, I should pay him 75 per cent. of my earnings. Pursuant to such agreement Sir A. Harris has found certain preference shares in the Carl Rosa Opera Company, Limited, and purchased some of the debts due by me; but, in consequence of there being some difficulty in dealing with such shares in the market, and some of the creditors having refused to take such shares, my solicitors up to the present time have been unable to purchase the whole of the debts. Towards the amount found by Sir A. Harris to purchase such debts he now deducts the agreed amount of £20 per week from the sums which may be payable to me."

The bankrupt also deposed that, under an order of the Divorce Division, he had to pay 4*l.* per week to his wife for alimony.

Upon the application of the official receiver, as trustee in the bankruptcy, the registrar made an order which stated that, "It having been made to appear to the Court that the bankrupt is

in receipt of a salary of 30*l.* per week as a comedian," and upon reading the bankrupt's affidavit, "it appears to the Court just and reasonable that the sum of 15*l.* per week, portion of the said salary, ought to be paid by weekly instalments to the official receiver as trustee during the bankruptcy, in order that the same may be applied in payment of the debts of the bankrupt, and that the first of such payments ought to be made on the 21st November, 1891, and be continued weekly until this Court shall make order to the contrary; it is ordered that the said sum of 15*l.* per week shall be paid in manner aforesaid out of the bankrupt's said salary, with liberty to the bankrupt to apply after the 17th December, 1891, if his engagement with Sir A. Harris should be then terminated."

Against this order the bankrupt appealed.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the appellant. (1.) The payment which the bankrupt receives under the agreement with Sir A. Harris is neither "salary" nor "income" within the meaning of sub-s. 2 of s. 53 of the Bankruptcy Act, 1883 (1), under which the order purports to be made. The payment is contingent on the happening of different events, and is uncertain in amount, and must be regarded as the earnings of a professional man by the exercise of his skill. Such earnings are not "salary" or "income" within sub-s. 2. The "income" must be income in the nature of salary: *Ex parte Huggins* (2); *Ex parte Benwell.* (3)

[LORD ESHER, M.R., referred to *In re Brindley.* (4)]

In that case the bankrupt was a commercial traveller, and had

(1) Sect. 53 (1.): "Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the Court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct."

(2.) "Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the Court may direct."

(2) 21 Ch. D. 85.

(3) 14 Q. B. D. 301.

(4) 4 Morrell's Bank. Cas. 104.

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an annual salary of 100*l.*, which was paid weekly. His earnings were not precarious as those of the bankrupt in the present case are.

(2.) If the payment is either "salary" or "income," still the bankrupt is not in the receipt of 30*l.* a week; he is not in receipt of more than 6*l.* a week. The "salary" or "income" was not part of the "property of the bankrupt" which vested in the trustee in the bankruptcy under s. 54; the creditors had no right whatever to any part of it until an order should be made under s. 53. Notwithstanding the receiving order, the bankrupt was, therefore, free to make any arrangement he pleased with Sir A. Harris about the salary, and he has made a perfectly valid agreement, by virtue of which 20*l.* a week is to be deducted from the 30*l.* This leaves 10*l.* a week, and, when the 4*l.* a week alimony is deducted, the bankrupt is not "in the receipt" of more than 6*l.* a week. In these circumstances no order at all ought to have been made under s. 53, sub-s. 2; or, at any rate, the amount which is ordered to be paid to the trustee is utterly unreasonable.

Sir *E. Clarke*, S.-G., and *Muir Mackenzie*, for the official receiver, were called upon only as to the second point.

The evidence is not to be relied upon as to the arrangement which is alleged to have been made with Sir A. Harris since the receiving order. It is not shewn that there is any binding agreement, or that Harris has advanced any money which entitles him to repayment. There is nothing to shew that any creditor has agreed to the arrangement. The deduction from the bankrupt's salary is equivalent to a voluntary payment by him.

LORD ESHER, M.R. Two questions arise on the construction of s. 53, sub-s. 2, of the Bankruptcy Act, 1883. The first question is, whether this money which was to be earned by the bankrupt (assuming him to have earned the whole of it) was salary, or income in the nature of salary. The money was to be paid to him under a contract made between himself—an actor—and the manager of a theatre. In my opinion, it is a mutual contract for services on the one side, and for payment for those services on the other. The money was to be paid weekly, and, under certain circumstances, there was to be either a forfeiture or a deduction. If

nothing of that kind happened, it was to be paid at specified times. The payments being made under a contract, I cannot say that the ruling of this Court in *Ex parte Benwell* (1) applies. When there is a contract, the payment cannot be said to be precarious within the meaning of that decision. There is a right on the one side to the payment, and a right on the other to the services. It was urged that the bankrupt could not be compelled to act. Of course he could not. But he was under a legal obligation to act, and the manager was under a legal liability to pay him. Therefore, the payment was not precarious. The money was to be paid for services, and it was to be paid at ascertained periods. Therefore it comes, to my mind, under the term "salary," or, if not, it most certainly comes under the term "income," which must mean, as we held in *Ex parte Benwell* (1), income in the nature of a salary. We have held that the word "income," as used in this section, does not mean all income, or all that property of a man which is generally called his income; for, in most cases, income of that kind would vest in the trustee on his bankruptcy, and thus go to the creditors. But the Act assumes that there is some income of a bankrupt which is not part of his property so as to vest in the trustee in his bankruptcy. It follows, to my mind, that the income to which s. 53 refers must be income in the nature of a salary. I cannot doubt that the sum payable to the bankrupt under this agreement is a "salary," but at any rate it is "income." Therefore, as regards the construction of the Act in this respect, I agree with the decision of the Divisional Court in *In re Brindley* (2), and I adopt it. I think the present case is similar.

Then comes the second question. The order appealed from was made upon the assumption that the bankrupt was in the receipt of a salary or income of 30*l.* a week, and it orders that he shall pay to the trustee for his creditors (who are not entitled to it at all without an order of the Court) 15*l.* a week out of the 30*l.* But then comes the question, Is the bankrupt in receipt of 30*l.* a week?

Now, I will assume that he would have been entitled to 30*l.* a week, if nothing else had been done. But, with regard to this

(1) 14 Q. B. D. 301. (2) 4 Morrell's Bank. Cas. 104.

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Lord Esher, M.R.

particular salary or income which does not pass to the trustee, the bankrupt had a right, notwithstanding the receiving order, to make any bargain he chose. He had a right, either before or after the bankruptcy, to cancel the agreement or to alter it, or to do anything he pleased with it, so far as his creditors were concerned. He and Sir Augustus Harris, without infringing in any way the bankruptcy law, without infringing any right of the creditors, were entitled to make any new agreement they pleased with regard to this contract.

Now, it was sworn before the registrar that they had entered into a new agreement, by virtue of which Sir Augustus Harris, in consideration of his advancing money, or giving away property which he had a right to deal with as he pleased, for the advantage of the bankrupt, became entitled, as between himself and the bankrupt, to deduct 20*l.* a week from his salary or income due under the first agreement. They had a perfect right to do that. Can it, then, be said, if this agreement is a good one, that the bankrupt is, within the meaning of the Act, "in receipt" of a salary or income of 30*l.* a week? The very statement of the case shews that he is not. He is not in receipt of it in fact. Sir Augustus Harris withholds it; and he withholds it, in my opinion, under a perfectly valid agreement made between himself and the bankrupt, with which the creditors cannot interfere. Therefore, in truth the bankrupt does not receive 30*l.* a week, and in law he cannot receive it. Twenty pounds is to be deducted before he receives it, and so he receives only 10*l.*

But then again the law has stepped in, and has taken away 4*l.* a week more. The Divorce Court has ordered him to pay 4*l.* a week to his wife for alimony. Therefore, so far from receiving 30*l.* a week, he receives only 6*l.*

Under these circumstances ought the Court, which has a discretion in the matter, to order him to pay 15*l.* a week? It cannot be done. The order compels him to pay for the benefit of his creditors 15*l.* a week when he receives only 6*l.* a week, out of which he has to live and clothe himself. I am sure that if the learned registrar had had all the facts fully brought to his mind, he would not have made the order.

[The Master of the Rolls then examined and overruled the

objections to the accuracy of the bankrupt's affidavit, and continued :—]

Acting between the bankrupt and his creditors, I think no order ought to be made the effect of which would be to put him on a starvation allowance in order that his creditors may get more than that to which the law of bankruptcy of itself gives them a right. I think, therefore, that the registrar's order must be set aside.

BOWEN, L.J. I am of the same opinion. There are two points of law in this case. The first is, whether the sum which is payable by Sir Augustus Harris to the bankrupt is a salary or income within s. 53, sub-s. 2. I am of opinion, having regard to the contract, that it is a salary. "Salary," I think, must mean a definite payment for personal services arising under some contract, and (to borrow an expression of my brother Fry) computed by time. This payment to the bankrupt fulfils, as it seems to me, that description exactly. But, if it were not "salary," I think it would be "income." It was said by this Court in *Ex parte Benwell* (1), that the word "income" in s. 53, sub-s. 2, must be construed by the light of the word "salary"—that it is ejusdem generis with it. What is meant by ejusdem generis? Not that "income" is identical with "salary," but that there is a genus under which, in common with "salary," it might be classified. In other words, it possesses some of the same qualities which "salary" does. I do not mean to decide the point, but I am inclined to think that, if the payments had not been computed with reference to recurrent events the happening of which was contemplated by the contract, it would not be a "salary."

But the second point is, I think, the more important. It seems to me that a man is not, within the meaning of this section, "in receipt" of a salary when in fact he does not receive it, and when he has no right in law to receive it, because it is by his own contract made after the bankruptcy that he has lost the right to receive it. The opposite view depends on a fallacy, which, I cannot help thinking, betrayed itself from time to time in the Solicitor-General's argument, viz., that there was some

(1) 14 Q. B. D. 301.

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fraud on the bankruptcy law in the bankrupt's entering into the contract with Sir Augustus Harris with regard to the deduction of 20*l.* a week from his salary. As the Master of the Rolls has already said, the original contract was for personal services, and the creditors are not entitled to the benefit of it by the law of bankruptcy; and, until this sub-section was put in force against him, by diverting to the use and advantage of his creditors that which was primâ facie up to that moment his own, he had a perfect right, although he was a bankrupt, to make any bargain he pleased with any person as to the remuneration which he was to receive for his personal services. Therefore, the contract which he made with Sir Augustus Harris was good in law. And, if that contract was impeachable neither in morals nor in law, how can it be said that a man is in receipt of a salary of 30*l.* from his employer, when he has made a valid contract with his employer to the effect that the salary is no longer to be paid to its full amount, but that part of it is to be retained for considerations which the employer gives in other ways? The bankrupt has ceased to be in receipt of the salary of 30*l.* He is no longer in receipt of it in fact, and he is no longer entitled to receive it in law. It is impossible that this section can displace this contract with Sir Augustus Harris; such a contract cannot be so displaced. The section would work great injustice if a salary were treated as still existing, although it has been cut down.

Then comes the question of discretion. There is some limit. According to the contention of the Solicitor-General the trustee would be entitled in point of law, although the bankrupt had parted with the whole of his salary and was receiving not a farthing of it, to have an order made compelling him to pay it over again to the trustee for the benefit of the creditors. Such a thing is ridiculous. But, as a matter of discretion, which is the point I am now dealing with, what judge at chambers, in the case of a debtor summons, would ever have compelled this man to pay over again to his creditors, even if he could do so, that which he had already by a lawful and binding contract pledged himself to allow another man to deduct? It could not be done. It would be the grossest oppression if such an order were made, and I do not believe that such was the intention of the section.

FRY, L.J. With regard to the question whether this payment is "salary or income" within the meaning of s. 53, I am of opinion that it is "salary," and, if it is not, it is clearly "income" in the nature of salary. Whenever a sum of money has these four characteristics—first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time; and fourthly, that it is payable at a fixed time—I am inclined to think that it is a salary, and not the less so because it is liable to determination at the will of the payer, or that it is liable to deductions. I do not mean to say that that is a complete definition of "salary," or that it includes every kind of salary; but I think that, whenever these four circumstances concur, the payment is a salary. But, if that be not accurate, when these circumstances concur the payment is "income" in the nature of a salary. For the present purpose it is immaterial to discriminate between "salary," and "income" in the nature of a salary.

The next point is, whether it can be said that the appellant is "in receipt" of a salary, or income in the nature of a salary, of 30*l.* a week. I regard the words of the section and of the order as referring to actual receipt. They do not refer to title. They refer to the actual receipt of the money. I do not say that, if there were a colourable or sham arrangement, by which a man was made to appear not to be in receipt of a sum of which he was still actually in receipt, the Court would not see through it. But the question is, Is the man really and actually in receipt of that sum? From the agreement in the present case it is plain that the bankrupt is not in receipt of 30*l.* a week. He is in receipt of only 10*l.*, out of which he has to pay 4*l.* to his wife. At any rate, he is not in receipt of more than 10*l.* The argument for the trustee comes to this, that, if it can be shewn that the agreement for deduction is one which ought not to have been entered into, it cannot be treated as a deduction. Even if that is true, which I think it is not, it does not apply here, because it is plain that this agreement is a perfectly valid one. This section does not enable the Court to require a bankrupt to receive anything. It only gives a discretionary power to the Court when the man is in actual receipt of a sum of money. The

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Court can neither restrain a bankrupt from entering into a valid agreement about his salary, nor compel him to earn his salary, nor prevent his forfeiting it. He is a free man in respect of all these things. The section only applies when he is actually in receipt of a salary or income.

The third point is, whether, the bankrupt being in receipt of a salary or income of 10*l.* a week, which is liable to a deduction of 4*l.* a week, we ought to order him to pay 15*l.* a week. The question answers itself. I think, therefore, that the registrar's order must be discharged.

LORD ESHER, M.R. I wish to add for myself, that, in exercising this discretionary power, I think the Court ought not to cut down the bankrupt's means of livelihood too closely, but ought to leave a liberal margin for his support.

FRY, L.J. I should like to consider that point when it arises. I do not express any opinion about it now, one way or the other. It does not, I think, arise for decision in this case.

Appeal allowed.

Solicitors: *E. W. Garnett; Solicitor to Board of Trade.*

W. L. C.

C. A. 1892 *Feb.* 19, 20.

[IN THE COURT OF APPEAL.]

IN RE GALLARD. EX PARTE HARRIS.

Bankruptcy—Remuneration of Trustee—Fixing of Remuneration delegated to Committee of Inspection—Power of Board of Trade to review Decision of Committee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 72, *sub-s.* 2—*Bankruptcy Forms*, 1886, *No.* 122.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 72, (1.) "Where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors, or, if the creditors so resolve, by the committee of inspection.

(2.) "If one-fourth in number or value of the creditors dissent from the resolution . . . . the Board of Trade shall fix the amount of the remuneration":—

Held, by the Court of Appeal (affirming the decision of Vaughan Williams, J.)

that the Board of Trade has power, on the application of the prescribed number of dissentient creditors, to fix the remuneration of the trustee, not only when his remuneration has been fixed by a resolution of the creditors, but also when it has been fixed by a resolution of the committee of inspection in pursuance of an authority delegated to them by a resolution of the creditors.

THIS was an application to review the decision of the Board of Trade fixing the remuneration of the trustee in this bankruptcy, on the ground that they had no jurisdiction under s. 72 of the Bankruptcy Act, 1883, to do so.

On September 10, 1887, G. Gallard was adjudicated a bankrupt.

On October 6, 1887, the creditors at their first meeting appointed a committee of inspection, and further resolved that James Harris should be the trustee of the property of the bankrupt, "at a remuneration to be left to the committee of inspection."

There were thirty-three creditors in all, of whom eighteen voted for the resolution.

On January 15, 1891, the committee of inspection passed the following resolution:—

"The subject of the trustee's remuneration was discussed, and, having regard to the business carried on at the brickfields, to the numerous redemptions of properties to enable the equities to be realized, and to the litigation forced upon the trustee by various parties, also to the investigation which he was instructed to make of the partnership accounts in which the bankrupt was interested, and the time occupied thereon, and in the administration of the bankrupt's estate—

"It was resolved, that his remuneration be fixed at 18 per cent. upon the amount realized, and 5 per cent. upon the amount distributed in dividend."

On August 19, 1891, a first and final dividend of 2*s.* 7½*d.* in the pound was declared by the trustee, and, from the statement of accounts which accompanied the notice of the intended dividend, the creditors for the first time became aware of the amount of the trustee's remuneration which had been fixed by the committee.

On September 10, 1891, twelve of the creditors (five of whom had voted for the resolution of October 6, 1887) signed a request

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to the Board of Trade, stating that they dissented from the resolution of the committee of inspection, and requesting the Board of Trade to fix the remuneration of the trustee under the power conferred on them by sub-s. 2 of s. 72 of the Bankruptcy Act, 1883.

Thereupon the Board of Trade investigated the matter, and on December 17, 1891, fixed the trustee's remuneration at 10 per cent. upon the assets realized, aud 5 per cent. upon the amount distributed in dividend.

The trustee objected that the Board of Trade had no power under the circumstances to fix his remuneration, and applied to the Court to reverse their decision.

1892. Jan. 26. *Bigham, Q.C.*, and *Herbert Reed*, for the trustee. When the committee of inspection have been deputed by the general body of the creditors to fix the remuneration of the trustee, and have passed a resolution fixing the remuneration, the Board of Trade have no power to review their decision. The words "the resolution," in sub-s. 2 of s. 72, do not mean a resolution of the committee fixing the remuneration, but a resolution of the creditors fixing the remuneration.

Sir R. E. Webster, A.G., and *Muir Mackenzie*, for the Board of Trade. The resolution to be reviewed is the resolution fixing the remuneration. It is the rate of remuneration which has to be reviewed, and the functions of the Board of Trade do not come into operation until the remuneration has been fixed and is objected to. Sub-s. 3 of s. 72 supports this view.

Bigham, Q.C., in reply.

VAUGHAN WILLIAMS, J. The real question is, whether the Board of Trade have any jurisdiction to review the amount of the trustee's remuneration in cases in which the fixing of the remuneration has been delegated by the creditors to the committee of inspection. In my opinion, the Board of Trade have jurisdiction to review the remuneration, not only in cases in which the remuneration has been fixed by the creditors themselves, but also in cases in which the remuneration has been fixed by the committee of inspection to whom the creditors have

delegated that matter. The question really depends upon the construction of s. 72 of the Act. The 1st sub-section of s. 72 runs thus: "Where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors, or, if the creditors so resolve, by the committee of inspection." So that there are two courses open to the creditors. One is to fix the remuneration themselves, and the other is to leave it to be fixed by the committee of inspection. Then sub-s. 2 says: "If one-fourth in number or value of the creditors dissent from the resolution, or the bankrupt satisfies the Board of Trade that the remuneration is unnecessarily large, the Board of Trade shall fix the amount of the remuneration." I have been invited to say that the word "resolution" in sub-s. 2 refers only to a resolution of the creditors fixing the remuneration. I do not understand it to be argued that the word "resolution" in sub-s. 2 can apply to a resolution of the creditors delegating the matter to the committee of inspection, because it is abundantly clear, if you look at sub-s. 2, and at the first words of sub-s. 3, that the word "resolution" in sub-s. 2 can only refer to a resolution which fixes the remuneration. But the contention of the trustee was that the word "resolution" in sub-s. 2 means "resolution of the creditors fixing the remuneration," and that if it is the vote (by resolution or otherwise) of the committee of inspection which fixes the remuneration, the Board of Trade were not intended to have any jurisdiction to review their decision. This consideration is not on the facts (I do not mean the facts in this particular bankruptcy, but on the facts which occur in bankruptcy generally) absurd, because the legislature may very well have thought it desirable that the Board of Trade should have jurisdiction to review a resolution of the creditors, but that, if the creditors chose to refer the matter to a select committee, then the decision of that committee should be final, and there should be no appeal to the Board of Trade. I said "select committee," because one may assume that a committee of inspection are as a rule chosen from their knowledge of business in general and their knowledge of the estate of the particular bankrupt. Therefore I do not reject Mr. Bigham's argument in any degree upon the ground

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that to assent to it would be a reductio ad absurdum, and lead to results which the legislature cannot reasonably be supposed to have intended; but I reject it upon what seems to me the proper construction of s. 72. I have to say whether the word "resolution" includes a resolution of the committee fixing the remuneration, or whether it is limited to a resolution of the creditors fixing the remuneration. Now, if the words of sub-s. 2 had been, "If one-fourth in number or value of the creditors present at the meeting dissent," there could have been no argument, and necessarily sub-s. 2 would have referred only to a resolution of the creditors. But sub-s. 2 does not provide for the creditors expressing their dissent at the meeting at which the resolution is passed. It leaves it open, as I read it, to the creditors to express their dissent at any time and in any manner they like. In the present case one-fourth in number of the creditors (I do not know anything about the value, but the requirement is alternative) have expressed their dissent by a communication addressed to the Board of Trade. I am not prepared to say that there is any limitation of the mode in which the creditors may express their dissent; all I say is, that it is manifest from the words of sub-s. 2 that they are not bound to express it at the meeting at which the resolution is passed. If they are not bound to express their dissent at that meeting, I see no reason whatever for limiting the occasion on which the one-fourth in value or number of the creditors may effectively express their dissent to the case in which the remuneration is fixed by a resolution of the creditors. It seems to me that the words are wide enough to include a case in which one-fourth in number or value of the creditors express their dissent from the amount of the remuneration as fixed by the committee of inspection. I do not think I have any right to cut down the meaning of sub-s. 2, or to put any limitation on it which is not expressed by its words. Having said this, I have only one thing to add: sub-s. 2 does not state any time within which the creditors are to express their dissent. I think it would have been much better if it had done so, for one can conceive a case in which the creditors might wish to express their dissent after the trustee had acted on the resolution and had bestowed his labour on the matter. But I suppose the

remedy for any possibility of that sort is, that neither the Board of Trade nor this Court, which has a control over the acts of the Board of Trade, would entertain for a moment a proposition to reduce the remuneration of the trustee after he had been allowed to bestow his labour upon the matter on the faith of receiving a certain remuneration. All that I am asked to decide on the present occasion is, whether the Board of Trade had power under sub-s. 2 of s. 72 to review the decision of the committee of inspection and to fix the remuneration of the trustee, and I hold that they had.

H. L. F.

The trustee appealed.

Feb. 19, 20. *Rigby, Q.C.*, and *Herbert Reed*, for the trustee. The question depends on the construction of sub-s. 2 of s. 72 of the Bankruptcy Act, 1883. (1) The trustee is to be appointed by the creditors; but he is not entitled to any remuneration unless there is an ordinary resolution of the creditors to that effect; if there is, then the creditors may either themselves by their resolution fix the amount, or they may delegate the fixing

(1) Sect. 72: (1.) "Where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors, or, if the creditors so resolve, by the committee of inspection, and shall be in the nature of a commission or per-centage, of which one part shall be payable on the amount realized, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend.

(2.) "If one-fourth in number or value of the creditors dissent from the resolution, or the bankrupt satisfies the Board of Trade that the remuneration is unnecessarily large, the Board of Trade shall fix the amount of the remuneration.

(3.) "The resolution shall express what expenses the remuneration is to cover, and no liability shall attach to the bankrupt's estate, or to the creditors, in respect of any expenses which the remuneration is expressed to cover."

Form 122 (in the Appendix to the Bankruptcy Rules, 1886) of "Statement to accompany notice of dividend and application for release," contains on the credit side (payments), an item "Trustee's remuneration as fixed by the (*a*);" and then there is a foot-note (*a*): "Creditors, or committee of inspection, or Board of Trade, as the case may be." At the end of the statement is the following note:—

"By s. 72, sub-s. 2, of the Act, it is provided that 'if one-fourth in number or value of creditors dissent from the resolution, or the bankrupt satisfies the Board of Trade that the remuneration is unnecessarily large, the Board of Trade shall fix the amount of the remuneration.'"

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of it to the committee of inspection. "The resolution" from which the minority of creditors are to dissent must mean a resolution of the creditors.

"Dissent" means dissent by voting against the resolution personally or by proxy; it does not mean "disapprove" at any time, or that a creditor who has not voted, or, having voted in favour of the resolution, has afterwards changed his mind, can dissent within the meaning of the resolution. The jurisdiction of the Board of Trade only arises when—though the creditors have passed a resolution that the trustee shall be remunerated, either fixing the amount of remuneration or referring it to the committee of inspection—one-fourth in number or value of the creditors voting have dissented from that resolution. The scheme of the Act is, that the Board of Trade are to fix the remuneration, unless the resolution by a certain majority fixes it, or delegates the fixing of it to the committee of inspection. The opposite contention involves this result, that, if all the creditors were present and voted, and the resolution was passed unanimously, one-fourth in number or value might at any time afterwards, even after the trustee had proceeded on the faith of being allowed a certain remuneration, turn round and invoke the interference of the Board of Trade. In the present case, some of the so-called "dissenting" creditors voted for the resolution to refer the remuneration to the committee of inspection. It would be contrary to all principle that they should be allowed to approbate and reprobate with regard to the same matter. Therefore, if the creditors pass a resolution by the requisite majority, delegating the fixing of the amount to the committee of inspection, the jurisdiction of the Board of Trade cannot arise. There is nothing absurd in this, because the committee of inspection are a picked body, selected on account of their qualifications and the amount of their interest in the estate.

Sir *E. Clarke*, *S.-G.*, and *Muir Mackenzie*, for the Board of Trade. There is no question of approbating and reprobating in the matter. The dissentient creditors have never assented to any particular amount of remuneration. They assented to refer the amount of remuneration to the committee of inspection; but as soon as they ascertained the amount fixed by the committee

they objected to it. Sub-s. 3 of s. 72 would more naturally have come before sub-s. 2. It shews what "the resolution" referred to in sub-s. 1 means, viz., a resolution fixing the amount of the remuneration, for it provides that the resolution shall express what expenses the remuneration is to cover. If the matter is delegated to the committee of inspection, they must pass a resolution fixing the amount of the remuneration and expressing what expenses it is to cover: see rule 305 of Rules of 1886. By s. 127 the rules are to have effect as if enacted by the Act. The resolution of the committee is a resolution of the creditors through the committee appointed by them. Then, if one-fourth in number or value of the creditors dissent from the resolution, the Board of Trade is to fix the amount. But the creditors cannot dissent till they know what amount has been fixed by the committee.

If the argument for the trustee is well founded, it would really nullify the provision that the resolution mentioned in sub-s. 1 of s. 72 may be an ordinary resolution, because such a resolution is one passed by a bare majority; whereas the contention really is, that the resolution must be passed by a certain majority in number and value. The other alternative mentioned in sub-s. 2 shews that the resolution contemplated must be one which fixes the amount of the remuneration, because it is impossible for the bankrupt to satisfy the Board of Trade that the remuneration is unnecessarily large until the amount has been fixed.

By s. 168 "general rules" includes forms, and the note to Form 122, of "Statement to accompany notice of dividend and application for release" by the trustee, clearly shews that the power of the creditors to dissent for the purposes of sub-s. 2 is not confined to voting against the original resolution, for what then would be the use of calling the creditors' attention to that power in a statement which is not sent to them till long after the original resolution?

The meaning of s. 72 is, that the resolution fixing the amount of remuneration or referring it to the committee may be passed by a bare majority, and then one-fourth in number or value of the creditors may afterwards dissent, and refer the matter to the Board of Trade.

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Rigby, Q.C., in reply. The rules, which were not made till after the passing of the Act, cannot affect its construction. The provision that they are to have effect as if enacted by the Act only means that they are to have the force of a statute. The contention for the trustee does not nullify the effect of the words "ordinary resolution" in sub-s. 1. There must be a resolution in order that the trustee should have any remuneration at all. So far the resolution may be an ordinary resolution. But, so far as the amount is concerned, there must be a certain majority, either fixing the amount or referring it to the committee of inspection, or else the Board of Trade must fix it.

LORD ESHER, M.R. The question which we have to determine depends, as it seems to me, entirely on the construction of sub-s. 2 of s. 72. The Act is a very difficult one to construe, and we have found many puzzles in it; but, after hearing the arguments, I have arrived at a conclusion as to the meaning of this sub-section.

In order to determine what the meaning is, I think it is well to consider what the course of business is under the different circumstances which are dealt with by the statute. When the creditors come to appoint a trustee, there arises the question whether he is to have any remuneration. I do not mean his expenses out of pocket, but remuneration for his services. Sect. 72 provides that the amount of his remuneration may be determined by the authority of the creditors in one of two ways: "Where the creditors appoint a person to be trustee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors, or, if the creditors so resolve, by the committee of inspection." It is obvious from the alternative that the word "shall" must be read "may." The trustee's remuneration may, therefore, be fixed by an ordinary resolution of the creditors—that is, at their meeting. But at that meeting at which the remuneration is to be fixed, the creditors are not obliged to fix it themselves; an alternative is given to them: "or, if the creditors" (that is, at the meeting) "so resolve, by the committee of inspection." That is, the remuneration "shall be fixed by the committee of inspection." There are, therefore,

these two alternative modes of fixing the remuneration. If the creditors at their meeting adopt the second alternative, it is obvious that they do not then fix the remuneration. If they delegate it to the committee of inspection they do not fix it, and it is not fixed. The committee have to fix it. How are they to fix it? By a vote. But in what form is the vote to be recorded? To my mind the rules which have been referred to, and the other provisions of the Act, shew that the vote must be recorded by a resolution. The resolution which is come to has to be recorded, but it cannot be passed by three-fourths in number or value of the creditors. The creditors are not there to pass it; it is the resolution of the committee, which may consist of three, or at the most five, members. There are, therefore, two modes of fixing the remuneration, and in each of them it is fixed by a resolution. But, in whichever mode the remuneration is fixed, the resolution is not to be absolutely final. Objection may be taken to it by dissentient creditors. The objection cannot be taken to a resolution which refers the matter to the committee of inspection; it must be taken to the resolution which fixes the remuneration.

Now, how are we to read sub-s. 2? To my mind it is quite clear that it refers to the resolution which fixes the remuneration. "If one-fourth in number or value of the creditors dissent from the resolution, or the bankrupt satisfies the Board of Trade that the remuneration"—that is, the remuneration fixed by a resolution—"is unnecessarily large, the Board of Trade shall fix the amount of the remuneration." Therefore, the bankrupt may satisfy the Board of Trade that the remuneration (which, as I have said, is a remuneration fixed by resolution) is unnecessarily large. How can he "satisfy the Board of Trade" until the remuneration is fixed? How can you object to the remuneration which is fixed except by objecting to the resolution which fixes it? Under the second alternative it is obvious that no creditors, except those who form the committee of inspection, are present when the remuneration is fixed, and yet one-fourth in number or value of the creditors may dissent from the resolution—that is, one-fourth in number and value of the whole body of creditors, not of those who were present when the resolution was passed. The

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resolution in sub-s. 2 must, therefore, mean the resolution fixing the remuneration, and, if the resolution which fixed the remuneration was passed by the committee of inspection, that is the resolution from which one-fourth in number or value of the creditors may dissent.

Then it is said the creditors cannot be allowed to vote one way at one time and another way at another time on the same matter. But, as the Solicitor-General has pointed out, under the second alternative in s. 72, sub-s. 1, the same people do not vote twice on the same matter. The first vote is, that the remuneration shall be fixed by the committee; the second vote is, that the minority do not approve of the remuneration which the committee have fixed. These are two different things; they do not vote twice on the same matter.

This construction seems to me to be fairly deducible from sub-s. 2 itself, when once you clearly understand the course which may be followed in fixing the remuneration. But I think that view of the meaning is greatly strengthened by Form 122, because the note at the bottom of the form, and which is part of the form, can have no meaning at all—it would be utterly insensible—unless it is intended to call the attention of the creditors, when they know what has been done about the trustee's remuneration, to this, that the Act gives them power to object to it. That, I think, immensely strengthens the construction at which we have arrived upon the words of the Act itself. In my opinion, the decision of Vaughan Williams, J., was right, and this appeal must be dismissed.

FRY, L.J. The question which we have to determine turns on the meaning of the two words "the resolution" in sub-s. 2 of s. 72 of the Bankruptcy Act of 1883. In order to understand those words we must first read sub-s. 1. That sub-section provides for the fixing of the remuneration (if any) of the trustee in one or other of two alternative ways. The one is by an ordinary resolution of the creditors; the other is by the committee of inspection, if the creditors so resolve.

It appears to me that, when the committee of inspection proceed to fix the remuneration, they must fix it by a resolution.

It is a matter to which they are bound to give their serious attention, and one which in its nature ought to be determined by them by a formal resolution. Therefore, of the two alternative modes of fixing the remuneration, this is the result: in the one case the remuneration is fixed by a single resolution of the creditors; in the other it is fixed as the result of two resolutions—first, the resolution of the creditors delegating the power of fixing it to the committee of inspection, and secondly, the resolution of the committee of inspection fixing the amount.

Now, let us see what "the resolution" means in sub-s. 3: "The resolution shall express what expenses the remuneration is to cover, and no liability shall attach to the bankrupt's estate or to the creditors in respect of any expenses which the remuneration is expressed to cover." In the first alternative there can be no question: it must mean the resolution of the creditors fixing the amount. In the second alternative, which of the two resolutions does it mean? Does it mean the resolution of the creditors delegating the authority to the committee of inspection, or does it mean the resolution of the committee of inspection exercising the authority so given to them? Let us look at the nature of the act which is to be done. The resolution is to express what expenses the remuneration is to cover. Is that a thing likely to be capable of expression at the time of the delegation of the authority? Probably not. Expenses cannot be foreseen. In this very case the committee of inspection in fixing the remuneration have taken into consideration the amount of the work done by the trustee in various ways which they specify. The natural time for saying what expenses are to be covered by the remuneration is the time when the quantum of the remuneration is fixed, because that quantum will naturally be fixed with reference to the expenses which it is to cover. Therefore, it appears to me that the words "the resolution" in sub-s. 3 mean, in the one alternative, the resolution of the creditors fixing the amount, and, in the other alternative, the resolution of the committee of inspection fixing the amount.

I think the same interpretation must be given to "the resolution" in sub-s. 2: "If one-fourth in number or value of the creditors dissent from the resolution." What does that mean?

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Does it mean dissent from the resolution fixing the amount, or dissent from the resolution delegating the authority? It does not say expressly which; it only says "the resolution," but it seems to me plain that it must mean the resolution which is referred to in sub-s. 3, the resolution which expresses what expenses are to be covered by the remuneration; and, as I have already pointed out, that must be the resolution which fixes the remuneration. It seems to me that it would be unreasonable to call upon a creditor to dissent from the delegation of the authority, although he may very reasonably be allowed to dissent from the exercise of that authority. It is not until he knows the quantum of remuneration to be paid to the trustee, and what expenses it is to cover, that he can be reasonably called upon to say whether he dissents. I think, therefore, that "the resolution" in sub-s. 2 means the resolution which fixes the amount of the remuneration; in the one alternative, it is the resolution of the creditors; in the other, it is the resolution of the committee of inspection.

LOPES, L.J. I felt for some time considerable doubt as to the proper construction of s. 72, sub-s. 2; but in the result I agree in the view which has been expressed by my learned brethren. I think "the resolution" in sub-s. 2 refers to the resolution which fixes the amount of the remuneration. I have been very much influenced in coming to this conclusion by the alternative words "or the bankrupt satisfies the Board of Trade that the remuneration is unnecessarily large." I cannot see how the bankrupt could be in a position to form an opinion whether the remuneration was or not unnecessarily large until it had been fixed. I think, therefore, that by "the resolution" is meant the resolution which fixes the amount of the remuneration, whether it is the original resolution of the creditors, or the subsequent resolution of the committee of inspection.

Appeal dismissed.

Solicitors: *Ashurst, Morris, & Co.; Solicitor to Board of Trade.*

W. L. C.

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Feb. 8, 19.

Revenue—Duties on Settlements of Personal Property—Voluntary Settlement—Reservation of Life Interest to Settlor—Deed of Partnership—Customs and Inland Revenue Acts, 1881 (44 & 45 *Vict. c.* 12), *ss.* 38, 39; 1889 (52 & 53 *Vict. c.* 7), *s.* 11.

By 44 & 45 Vict. c. 12, s. 38, stamp duties are imposed in respect of accounts delivered of personal property, including any property passing under any "voluntary settlement" made by any person dying on or after June 1, 1881, "by deed or any other instrument not taking effect as a will whereby an interest in such property for life . . . is reserved . . . to the settlor"; and by 52 & 53 Vict. c. 7, s. 11, the expression "voluntary settlement" is made to include any trust in favour of a volunteer, whether the deed or instrument effecting the settlement was made for valuable consideration or not as between the settlor and any other person.

By a deed made in 1877 between G. and his partners, it was provided that he might by deed or will dispose of his shares in the business to any one among a limited class of his descendants and that if no such disposition were made the shares should be forfeited after the death of G. It was further provided that no person should enjoy any share in the business until he had been certified by the senior partners as duly qualified. G. died in 1889, having by his will, in pursuance of the power given him by the deed of 1877, devised to his eldest son all his shares in the business. The son had been duly certified as qualified, and had been admitted a partner in the business:—

Held, that the deed of 1877 constituted a voluntary settlement whereby a life interest was reserved to G. within the meaning of s. 38 of 44 & 45 Vict. c. 12, and s. 11 of 52 & 53 Vict. c. 7, and therefore that duty was payable in respect of the shares.

INFORMATION by the Attorney General praying (inter alia) that it might be declared that the defendant was bound to deliver to the Commissioners of Inland Revenue an account of certain shares in a business and contingent fund passing under an indenture dated July 5, 1887, and to pay the duty chargeable under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), on the account so delivered according to the value of such property.

Sir R. E. Webster, A.G., and *Vaughan Hawkins*, for the Crown.

Jelf, Q.C., and *H. Tindal Atkinson*, for the defendant.

The facts and arguments sufficiently appear from the judgment of the Court.

Cur. adv. vult.

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Feb. 19. The judgment of the Court (Hawkins and Wills, JJ.) was read by

WILLS, J. By deed of partnership dated July 5, 1877, made between one Richard Gosling and several other persons, it was provided that the parties thereto should become partners in the business of banking, and that the partnership should continue to subsist between them, and the survivors of them, and the persons who should be admitted in their places respectively during the natural lives of themselves and such persons.

By art. 4, the business was to be considered as divided into forty-eight shares, whereof the said Richard Gosling (hereinafter called Richard Gosling, the father) should be entitled to eleven.

By art. 5, a certain fund called the "Contingent Fund" was to be considered as belonging to the parties thereto in the same shares as they were in the last article declared to be entitled to the business, and by art. 9 provision was made for the maintenance of the contingent fund.

By art. 22, in case of the death of any of the parties thereto, the person succeeding to him was to pay a certain sum to the executors or administrators of such deceased partner, and to bear the proportion of the deceased partner of the expenses incidental to the business, and indemnify the executors or administrators of the deceased partner.

Art 24. is as follows: "It shall be lawful for the said Richard Gosling," the father, "by deed or will to relinquish and dispose of his eleven shares in the business and contingent fund, and his share in" certain houses and premises wherein the business was carried on, "to any of his sons or grandsons of the name of Gosling, or to any son or grandson of Francis Gosling of the name of Gosling, or to any son of any one of the brothers of the said Richard Gosling" the father, "so, nevertheless, that no such relinquishment or disposition shall be in favour of any person who shall then be a partner in the firm; and that if the said Richard Gosling" the father, "shall not so relinquish or dispose of his said shares in the said business, contingent fund, houses and premises, the same shall on his death go" according to a certain scheme not necessary to particularize.

By art. 27 it was provided that, if at the expiration of four

years from the death of any of the parties thereto the shares of such deceased partner in the business and contingent fund, houses and premises, should not be succeeded to and enjoyed by some person under and by virtue of the clauses thereinbefore contained—that is to say, so far as Richard Gosling, the father, was concerned by virtue of art. 24—the senior partners should be entitled to declare such shares forfeited, and provision was made for the distribution in that event of such shares amongst the remaining partners.

By art. 29, every person admitted as a partner should, before admission as such, execute such deed of partnership as the senior partners should think proper.

By art. 31, shares should be disposed of only in accordance with the provisions of the deed of 1877.

By art. 40, no person should be entitled to become a partner, or "to enjoy any shares or interest in the business," unless and until the senior partners should by writing declare that he was a fit and proper person and duly qualified to become a partner.

Richard Gosling, the father, died on July 20, 1889. By his will, and in pursuance (as therein stated) of the power contained in the 24th article, he devised and bequeathed to his eldest son, Richard Gosling, all his freehold hereditaments in the City of London, and all his share and interest in the aforesaid contingent fund, and all his share and interest in the goodwill and assets of the partnership.

Richard Gosling, the son, has obtained and enjoys the said shares and interests, and has executed a fresh deed of partnership with the surviving partners.

The question is whether, under the Customs and Inland Revenue Act, 1881, ss. 38 and 39, such shares and interest ought to be included in an account, to be duly stamped, of the personal property which passed to Richard Gosling, the son, the present defendant, by virtue of the partnership deed of 1877 and the will of Richard Gosling, the father.

By the Customs and Inland Revenue Act, 1881, s. 38, the stamp duties in question are imposed on the personal property to be included therein, which property shall be (inter alia) "any property passing under any past or future voluntary settlement

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made by any person dying on or after June 1, 1881, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life is reserved either expressly or by implication to the settlor" (sub-s. 2 (*c*)).

The Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), was in force at the time of the death of Richard Gosling, the father. By s. 11, sub-s. 1, of that Act, "the description of property marked (*c*)" in s. 38 of the Act of 1881 "shall be construed as if the expression 'voluntary settlement' included any trust in favour of a volunteer, and if contained in a deed effecting the settlement, whether such deed was made for valuable consideration or not, as between the settlor and any other person."

It was not disputed that the effect of the appointment by will, in pursuance of the power contained in art. 24, was that the property so dealt with by the will must be considered, according to the *Attorney General* v. *Chapman* (1), as "passing under" the deed of 1877, nor that the question must be looked at as if the disposition in favour of Richard Gosling, the son, was contained in the deed of 1877 itself.

But it was argued that Richard Gosling, the father, did not "reserve" to himself a life interest in the shares, because he took them from his father under circumstances precisely similar to those of the present case, and under an appointment by virtue of a precisely similar power contained in a deed of 1861, containing identical provisions with those of the deed of 1877, and that, therefore, he never was in a position to have a complete dominion over them, and to create of his own will a life estate to himself, to which should succeed the interest ultimately vested in his son. The settlement, therefore, it was argued, was one effected by a sort of compulsion, and could not be said to be voluntary.

We think this reasoning is fallacious. We think that by the deed of 1877 a life interest in the shares was in fact reserved by Richard Gosling, the father, and we think it matters not, if that be so, whether or not it was so reserved by reason of some previous contract with the other parties to the deed. The result of the deed made in pursuance of such previous contract was, that,

(1) [1891] 2 Q. B. 526.

de facto, Richard Gosling, the father, had reserved to himself a life interest in the shares. "Reservation," even in its strictest sense, is not an exception out of a grant, but is "of a thing not in being but newly created of the tenements demised" (Co. Litt. 47); but in the present statute it is obviously used in no such sense, but as an ordinary English word with its popular meaning, and it does not mean more than that a life interest is kept or provided for, or secured to the person making the settlement. The shares, before Richard Gosling, the father, made the deed of 1877, were his. It is true that he was under contract to deal with them only in a specific way, and that in certain events they might be forfeited; but until forfeited, they belonged to no one else. Before he made the deed, it cannot be doubted that the senior partners had certified him as duly qualified; after which the power of forfeiture no longer existed, and the only right which, before the deed was executed, the other partners had, was the personal one of a contract, by which Richard Gosling, the father, on accepting the shares, was bound to deal with them in a particular way, including an obligation to execute a deed by which a life interest in them should be secured to him, as it in fact was as soon as he executed that deed. Here, then, was a deed by which a life interest in them was reserved to him; and the only remaining question is whether the shares which, when the will became operative, according to *Attorney General* v. *Chapman* (1), "passed under" the deed of 1877 to the defendant "passed under a voluntary settlement"; in other words, whether the settlement as regards Richard Gosling, the son, was voluntary. We cannot see how any answer but one can be given to this question. The Act of 1889, s. 11, as it appears to us, precludes us from taking into account that, as between himself and his partners, Richard Gosling, the father's, deed of 1877 was in no sense voluntary. But, as regards the son, the disposition in his favour was in every sense voluntary. There was nothing to bring him within the consideration of the partnership, in the sense in which he would have been within the consideration of his father's marriage settlement, and the partners had not even stipulated with his father for a provision in his favour,

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but he was by the voluntary act of his father selected as the beneficiary out of a number of persons.

We think such a disposition is within the purview of the Act. But for the deed of 1877, or some similar deed, if such a provision had been intended for the son on the death of the father, it would have had to be made by will, and probate duty, or, more strictly speaking, its equivalent, would have been payable; and the object of the Act was to strike with liability to such duty dispositions which, while preserving to a man the enjoyment of personal property to the day of his death, make the same property pass on his death to some one else, and so become substitutes for wills.

We wish to point out, in order to avoid any confusion for the future, that by an inadvertence in the judgment in the *Attorney General* v. *Chapman* (1), "legacy" duty is spoken of, where the phrase should be "probate" duty. The correction is verbal, and in no way affects the reasoning of that decision.

It was further argued that the shares did not pass under the settlement, but only a right to enjoy the shares in case a certificate of qualification could be obtained from the senior partners, and in case also some payments should be made, indemnities given, and covenants entered into. These considerations, however, affect only the value of what passed, and not the fact that an interest in the shares of some description passed—which is all that we have to decide.

Our judgment, therefore, must be for the Crown, and with costs.

Solicitor for Crown: *The Solicitor of Inland Revenue.*

Solicitors for defendants: *Woodrooffe & Burgess.*

(1) [1891] 2 Q. B. 526.

A. P. P. K.

SMITH *v.* BROADBENT & CO.

1892
Feb. 12.

Sheriff—Sheriff's Officer—Fees—Power of Sheriff's Officer to sue Execution Creditor for Expenses incurred in execution of Writ—Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55), *s.* 20, *sub-s.* 2—*Order as to Fees, Aug.* 31, 1888.

A sheriff's officer cannot maintain an action against an execution creditor for expenses incurred by him, under a writ of fi. fa. issued by the execution creditor, in making inquiries as to the goods of an execution debtor.

APPEAL by the plaintiff from the decision of the judge of the Bow County Court.

The action was brought to recover 1*l.* 1*s.* in respect of expenses incurred by the plaintiff, as sheriff's officer, in making inquiries as to the goods and chattels of one John Bowen, under a writ of fi. fa. issued by the defendants to the sheriff of Essex.

The defendants contended that a sheriff's officer was not entitled to sue an execution creditor for expenses incurred by him in that capacity, and the county court judge non-suited the plaintiff.

J. Ogle, for the plaintiff. The county court judge was wrong. The sheriff's officer is entitled to "take and receive" a fee of 1*l.* 1*s.* for expenses incurred by him in making such inquiries, by virtue of the Order as to Fees made under the Sheriffs Act, 1887. (1) That must be construed as giving him the power to sue for his fee.

(1) By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 20, sub-s. 2: "Any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff . . . may demand, take, and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor, with the advice and consent of the judges of the Court of Appeal and High Court of Justice, or any three of them, and with the concurrence of the Treasury."

By an Order dated August 31, 1888, the Lord Chancellor, with the advice and consent of three judges of the Court of Appeal and High Court of Justice, and with the concurrence of the Treasury, fixed the fees set forth in the schedule to the order "as the fees to be demanded, taken, and received by any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff in the several proceedings mentioned in the said schedule as from the date of this order."

The schedule contained the following item:—

"*Execution of Writs of Fieri Facias.*

"For expenses incurred by the sheriff's officer in

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Toller, for the defendants. The county court judge was right. The plaintiff is incapable of suing. The Sheriffs Act, 1887, is a consolidating Act, and does not give a sheriff's officer any further right of suing than he possessed before that Act was passed. Under the old Acts (28 & 29 Eliz. c. 4; 7 Wm. 4 & 1 Vict. c. 55) a sheriff's officer could not sue the execution creditor for expenses incurred by him in carrying out the execution. A sheriff might always sue the execution creditor for poundage if the execution proved abortive: *Stanton* v. *Suliard* (1); but the sheriff's officer is the servant of the sheriff, and cannot maintain an action against the execution creditor in his own name. If there was a special contract between the sheriff's officer and the attorney to the execution creditor, the sheriff's officer might sue the attorney for his fees: *Foster* v. *Blakelock* (2); *Walbank* v. *Quarterman* (3); *Ormerod* v. *Foskett* (4); but he could not do so without such a special contract: *Seal* v. *Hudson*. (5) *Brewer* v. *Jones* (6), which was to the contrary effect, was expressly overruled in *Royle* v. *Busby*. (7) No action could, however, be maintained by the sheriff's officer against the execution creditor when there was a special contract with the attorney: *Maile* v. *Mann*. (8) It is admitted that in the present case there was no special contract, and therefore the sheriff's officer could not maintain an action either against the attorney or against the execution creditor.

Ogle, replied.

HAWKINS, J. This action is brought to recover expenses incurred by the plaintiff as sheriff's officer in making inquiries as to the goods and chattels of an execution debtor under a writ of fi. fa. issued by the defendants to the sheriff of Essex. The only

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making inquiries as to the goods of an execution debtor, and as to claims for rent and other claims on the goods, the actual expenses not exceeding under any circumstances £1 1 0

"The foregoing fees shall be paid by the execution creditor, and shall not be recoverable by him, although the execution proves abortive."

(1) Cro. Eliz. 654.
(2) 5 B. & C. 328.
(3) 3 C. B. 94.
(4) 2 Peake, 77.
(5) 4 D. & L. 760.
(6) 10 Ex. 655.
(7) 6 Q. B. D. 171.
(8) 2 Ex. 608.

question that is now before us is whether, under the Sheriffs Act, 1887, and the Order and schedule of fees made in accordance with s. 20, sub-s. 2, of that Act, a sheriff's officer is entitled to maintain such an action. It is not suggested that there was any special contract between the defendants and the plaintiff. They simply issued their writ to the sheriff, and the plaintiff, as sheriff's officer, incurred the expenses for which he now sues, in the ordinary course of the execution of process. It is necessary to assume for the purposes of this case that the plaintiff properly incurred expenses to the amount of one guinea within the meaning of the first item of the schedule to the Order as to Fees of August 31, 1888, and that he is entitled to be reimbursed for those expenses. The only question is whether he can sue the execution creditor in respect of them. It is plain that if he cannot sue the execution creditor for them he cannot sue any one else. There is no special contract so as to make the attorney to the execution creditor liable, as there was in some of the cases which have been cited to us.

The Order as to Fees and the schedule to that Order authorize certain specified fees "to be demanded, taken, and received by any sheriff or officer of a sheriff." Every one knows that the sheriff himself does not execute a writ, but that he always acts through his under-sheriff and bailiffs. Nevertheless, many of the fees specified in the schedule could only be recovered by the sheriff himself, and not by any of his officers. What has been done here has been done in the course of the execution of a writ directed to the sheriff. Can the sheriff's officer sue for the expenses he has incurred, or is the proper course for the sheriff himself to sue for them? In the first place, is there any reason for allowing separate actions? The bailiff is an officer who acts as the sheriff's agent, and has no authority to act independently of him. He has no right to levy at all without instructions from the sheriff. He is merely employed to execute the writ for the sheriff, and it is possible that if many inquiries have to be made, more than one bailiff may be employed. Could it be contended that each of such bailiffs might have a separate action against the execution creditor in respect of the expenses incurred by each of them? There is no authority precisely in

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point as to the capability of a sheriff's officer to sue an execution creditor for his fees before the Sheriffs Act, 1887, but it seems to me that, in the absence of any authority, it would be most inconvenient and undesirable to allow several actions to be brought against the execution creditor by different persons in respect of the carrying out of the same execution. But is the power to sue given to the sheriff's officer by the Act of 1887? I do not think that it is. Sect. 20, sub-s. 2, says that a sheriff or an officer acting on his behalf may "demand, take, and receive" the fees to be fixed by the Lord Chancellor. That cannot mean that a sheriff's officer shall take them without regard to the sheriff. It is, I think, intended, and it is certainly most convenient, that the execution creditor should be liable only to the sheriff for these fees. The sheriff alone, therefore, can sue the execution creditor for them, and he must himself settle with the subordinates whom he has employed. The inconvenience of the opposite contention—that the sheriff's officer might sue apart from the sheriff—would be very great. It would leave the execution creditor at the mercy of the bailiff, and might lead to oppression. I therefore agree with the county court judge that the sheriff's officer is not entitled to bring this action, and I think that this appeal must be dismissed.

WILLS, J. I agree, and I have nothing to add.

Appeal dismissed.

Solicitors for plaintiff: *Gepp & Sons.*

Solicitors for defendants: *Morse & Simpson, for Parsons, Wykes, & Davis, Leicester.*

A. P. P. K.

RODGERS *v.* RICHARDS AND OTHERS. 1892 *Feb.* 15.

Criminal Law—Summary Jurisdiction—Information disclosing two Offences—Defect in Substance—Objection not to be Allowed—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *ss.* 1, 10.

On the hearing of a charge before a magistrate it was objected that the information disclosed two offences, contrary to the provisions of s. 10 of the Summary Jurisdiction Act, 1848. The magistrate allowed the objection, and dismissed the summons, but stated a case for the opinion of the Court :—

Held, that, although the prosecutor might have been required to elect on which charge he would proceed, the inclusion of two offences in one information was a "defect in substance" within the meaning of s. 1 of the Act, and that no objection to the information could be allowed in respect of it.

CASE stated by the stipendiary magistrate for Wolverhampton under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

On October 20, 1891, the defendants were charged, on the prosecution of the Inspector of the Royal Society for the Prevention of Cruelty to Animals, for that they did "on September 4, 1891, at Darlaston, unlawfully use a place—to wit, a room at the Old George Inn, at Darlaston—for the purpose of fighting two dogs, and did encourage and assist at the fighting of such dogs."

At the commencement of the hearing objection was taken that the information disclosed two offences—the one that of using a place for the purpose of fighting dogs, under the first portion of s. 3 of the Prevention of Cruelty to Animals Act (12 & 13 Vict. c. 92), and the other that of encouraging, aiding, and assisting at the fighting of dogs, under the latter part of the same section. The magistrate held the objection good, and refused to amend the information and summons, on the ground that, as by s. 14 of the Act every complaint must be made within one month after the cause of complaint had arisen, to amend would really be to grant a new summons after the expiration of the prescribed time.

Colam, for the prosecutor. Admitting that the information disclosed two offences, the magistrate ought not to have dismissed the summons. He ought to have amended the information and summons by calling on the prosecutor to elect on which charge

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he would proceed. It is true that no express power to amend is given by the Summary Jurisdiction Act, 1848; but the power is implied by s. 1, wherever, as in this case, there is a defect in substance or in form. (1)

The defendants did not appear.

HAWKINS, J. I think that this case must go back to the magistrate, and that he ought not to have dismissed the summons. It is admitted that the information disclosed two offences. By s. 10 of the Summary Jurisdiction Act, 1848, every information shall be for one offence only. The information was therefore bad as it stood. The question, therefore, is whether the magistrate had power to amend it. By s. 1 no objection is to be allowed to any information for any defect in substance or in form, or for any variance between it and the evidence adduced. Now, was the irregularity in this information a defect in substance or in form? In my opinion it was a defect in substance because the charging of two offences in one information is forbidden by statute. No objection, therefore, to the information ought to have been allowed on such a ground. In the case of a variance between the charge and the evidence adduced, the justices are empowered to adjourn the case, but this is only in the case of variance. Where the objection is for a defect in substance or in form, there is no such power. It seems only good sense to say that if the information charges two offences, the defendant must be prepared to meet both. He may rightfully object to being sued on more than one charge, and it would be competent to the justices to say whether the information in fact disclosed more than one offence. In the present case it is admitted that two offences

(1) By the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1, it is provided that "no objection shall be taken or allowed to any information, complaint, or summons for any alleged defect therein in substance or in form, or for any variance between such information, complaint, or summons, and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the justice or justices present and acting at such hearing, to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such justice or justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day."

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were charged. That is, as I have said, a defect in substance, in respect of which no objection should have been allowed, and the case must therefore be remitted to the magistrate.

WILLS, J. I am of the same opinion. The scheme of the Summary Jurisdiction Act, 1848, is plain. When a person has once been brought before the justices, the case against him is not to be got rid of on account of any defect in substance or in form in the information. If the evidence discloses a variance between the charge and the actual offence proved, the justices have power to adjourn the case in order that the defendant may be prepared to meet the offence disclosed by the evidence. The justices, no doubt, if two offences are charged in one information, may decline to allow the prosecutor to proceed on both; but it is impossible to say that because one such charge is discarded, the other cannot be proceeded with.

Case remitted to the magistrate.

Solicitor for prosecutor: *A. Leslie.*

A. P. P. K.

THE ROYAL COLLEGE OF VETERINARY SURGEONS *v.* ROBINSON.

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Feb. 15.

Veterinary Surgeon—Qualified Person—Veterinary Surgeons Act, 1881 (44 & 45 *Vict. c.* 62), *s.* 17, *sub-s.* 1—*Use of Description by an Unqualified Person stating Special Qualification—"Veterinary Forge."*

By the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 17, sub-s. 1: Any person not possessing the prescribed qualifications who, after December 31, 1883, "takes or uses . . . any name, title, addition, or description stating that he is . . . a practitioner of veterinary surgery, or of any branch thereof, or is specially qualified to practise the same," shall be liable to a fine.

The defendant was a shoeing smith, and was not possessed of the qualifications specified by the section. He had for the last twenty-five years described his place of business as a "veterinary forge":—

Held, that these words constituted a description stating that he was specially qualified to practise a branch of veterinary surgery within the meaning of the section; and that he was, therefore, liable under the section.

CASE stated by a metropolitan police magistrate under 42 & 43 Vict. c. 49.

On December 8, 1891, an information was laid on behalf of

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the Royal College of Veterinary Surgeons, charging that John Robinson, of 6A King Street, High Street, Kensington, not being on the register of veterinary surgeons, and not holding at the time of the passing of the Veterinary Surgeons Act, 1881, the veterinary certificate of the Highland and Agricultural Society of Scotland, did, on November 28, 1891, unlawfully use and take an addition and description stating that he was specially qualified to practise a branch of veterinary surgery, contrary to s. 17 of the Act. (1)

It appeared that the defendant was not on the register of veterinary surgeons, and did not at the time of the passing of the Act hold a veterinary certificate of the Highland and Agricultural Society of Scotland, but that he was a shoeing smith, and had for the last twenty-five years displayed in a prominent place on his business premises and on billheads the words, "J. Robinson, veterinary forge." The magistrate did not think that these words constituted an addition or description, stating that the defendant was specially qualified to practise a branch of veterinary surgery within the meaning of the Act, and dismissed the information.

Lumley Smith, Q.C., and *Colam*, for the prosecutors. The learned magistrate was wrong in refusing to convict. The use of the description "veterinary forge" implies in ordinary language that the respondent is specially qualified to shoe horses in accordance with the principles of veterinary surgery, and it is therefore contrary to the provisions of s. 17.

George Elliott, for the defendant. The expression "veterinary forge" is not a statement of any special qualification on the part of the respondent, nor is there any evidence that persons were in fact misled by it. Sect. 17 of the Act only imposes a penalty for

(1) By the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 17, sub-s. 1: "If after the 31st day of December, 1883, any person other than a person who for the time being is on the register of veterinary surgeons, or who at the time of the passing of this Act held the veterinary certificate of the Highland and Agricultural Society of Scotland, takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description, stating that he is a veterinary surgeon, or a practitioner of veterinary surgery, or of any branch thereof, or is specially qualified to practise the same, he shall be liable to a fine not exceeding 20*l.*"

a "name, title, addition, or description stating" that the person is specially qualified in the veterinary art; and differs, therefore, from s. 16, which imposes a penalty for a description "stating or implying" qualifications. [He cited *Ladd* v. *Gould.* (1)]

Lumley Smith, Q.C., replied.

HAWKINS, J. In this case I think that the magistrate ought to have convicted the defendant. The preamble to the Veterinary Surgeons Act, 1881, runs thus: "Whereas it is expedient that provision be made to enable persons requiring the aid of a veterinary surgeon for the cure or prevention of diseases in or injuries to horses and other animals to distinguish between qualified and unqualified practitioners." Nothing is so likely to produce injury to a horse as unskilful treatment of its feet and improper shoeing. The 16th section of the Act refers only to the assumption of a name, title, or description which would imply that the person using it was a member of the College of Veterinary Surgeons; but the 17th section provides that a person who without the necessary qualification "takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition or description stating that he is a veterinary surgeon, or a practitioner of veterinary surgery, or of any branch thereof, or is specially qualified to practise the same," shall be liable to a fine. Now, what was the defendant's offence? He was charged with having unlawfully used and taken an addition and description stating that he was specially qualified to practise a branch of veterinary surgery. What he did in fact was to carry on a shoeing forge, and to put before the word "forge" on his billheads and notices the word "veterinary." It is true that he did not profess that he had himself any veterinary skill; but no one seeing those words "veterinary forge" could fail to come to the conclusion that he was carrying on at that forge a business which in fact he was not specially qualified to carry on. This is, as it seems to me, exactly a case to which the Act was intended to apply. A man having no special qualification uses a phrase in describing his business which would cause people to think that he did possess a special qualification. He

(1) 1 L. T. (N.S.) 325.

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is not a veterinary shoer of horses in the sense in which those words would be understood by the public generally.

There is no suggestion here of any fraudulent or false representation on his part. If there were, the case of *Ladd* v. *Gould* (1) would be in point. That was a case of fraudulent deception.

In my opinion, therefore, the defendant was unlawfully using a description stating that he was specially qualified to practise a branch of veterinary surgery, and the case must go back to the magistrate in order that there may be a conviction.

WILLS, J. I am of the same opinion. I think that the word "qualified" is used in the section in its popular and not in its technical signification. I have no doubt that these words "veterinary forge" do imply that any person taking horses to the forge would get the benefit of veterinary skill and treatment for them. That is precisely what the Act of Parliament intended to stop, as is evident from the preamble. The case must, therefore, be remitted to the magistrate.

Case remitted to the magistrate.

Solicitor for plaintiffs: *G. Thatcher.*
Solicitor for defendant: *John Haynes.*

(1) 1 L. T. (N.S.) 325.

A. P. P. K.

CHAPPELL *v.* OVERSEERS OF ST. BOTOLPH.

1891
Oct. 29.

Poor-rate—Rateable Occupation—Land used for Exhibition of Advertisements—Land "not otherwise occupied"—Advertisement Hoardings—Beneficial Occupation—Advertising Stations (Rating) Act, 1889 (52 & 53 *Vict. c.* 27), *ss.* 3, 4.

By s. 3 of the Advertising Stations (Rating) Act, 1889: "Where any land is used temporarily or permanently for the exhibition of advertisements, or for the erection of any hoarding, frame, post, wall, or structure used for the exhibition of advertisements but not otherwise occupied, the person who shall permit the same to be so used, or (if he cannot be ascertained) the owner thereof, shall be deemed to be in beneficial occupation of such land or part thereof, and shall be rateable in respect thereof to the relief of the poor and to all local rates, according to the value of such use as aforesaid."

The appellant, a contractor for the erection of buildings upon land vested in the Postmaster-General, erected a hoarding round the land, and in pursuance of a clause in the contract permitting the use of the hoarding for advertising purposes, let the hoarding to a firm of advertisement contractors. The hoarding was erected upon the public street under a licence granted by the Commissioners of Sewers. The appellant's name having been inserted in the poor-rate as the person liable under s. 3 to be rated in respect of the hoarding:—

Held, that the hoarding had been erected upon land "not otherwise occupied" within the meaning of s. 3; that the appellant was the person who had permitted the land to be used for the exhibition of advertisements within the meaning of that section; that he must, therefore, be deemed to be in beneficial occupation of the land, and that his name had been properly inserted in the rate.

Case stated by justices for the City of London upon the hearing of an application by the respondents to insert the name of the appellant, in pursuance of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), in a poor-rate made by the parish of St. Botolph, as the person liable to be rated in respect of certain property described in the rate as advertising stations. The following facts appeared from the case:—

At the time of the making of the rate, certain land in the parish of St. Botolph was vested in the Postmaster-General in his corporate capacity on behalf of Her Majesty; it was bounded by certain streets which were highways repairable by the inhabitants at large, and were under the control of the Commissioners of Sewers for the City of London. Previous to the making of the rate, gantries or scaffoldings, with hoardings

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affixed thereto, were erected for the purposes of new buildings to be built on the said land as an extension of the General Post Office, and for the protection of the traffic in the adjoining streets. The posts of the gantry stood on planks, and were fixed thereto by iron dogs and dowels, the planks resting on the surface of the paving of the public footway. No portion of the structure was embedded in the soil or affixed to the paving and public footway, but the structure was kept in position by its own weight.

The appellant was the contractor with the Commissioners of Works for the erection of the new buildings on the Post Office land, and by his contract covenanted to maintain the existing hoardings (which included the two hoardings in respect of which the case was stated). When no longer needed, the hoardings were to be removed and become the appellant's property. The hoardings might, during the works, be used for advertising purposes to a height not exceeding twelve feet. The appellant paid to the Chamberlain of London the sum of 10*l.*, and the Commissioners of Sewers then issued their licence to the Commissioners of Works for the erection of hoardings. No other licence had been issued in respect of the hoardings, and no conditions made as to their use for advertisements under s. 5 of the Advertising Stations (Rating) Act, 1889 (52 & 53 Vict. c. 27).

The appellant let to Hill & Co., advertising contractors, the use of the hoardings for affixing posters and other advertisements, for the sum of 60*l.* per month, for the period that the hoardings should remain in position; and the hoardings had been and were still being used by Hill & Co. under the agreement, and payments had been made by them to the appellant in accordance therewith.

The Postmaster-General had not been rated to the relief of the poor in respect of the Post Office land in the respondent parish, but had always paid to the overseers what was called a contribution in lieu of poor-rate; in the rate book, at the end of the rate, his name was inserted in respect of the Post Office land.

The appellant contended (inter alia) (1.) that advertising

hoardings were not made rateable under the Advertising Stations (Rating) Act, 1889, but the lands whereon the same were erected; (2.) that if the word "land" in s. 3 of the Act were held to include the street, the land whereon the hoardings were erected was "otherwise occupied" within the meaning of that section than merely for the erection of such hoardings or other structures used for the exhibition of advertisements; (3.) that the portions of the street adjoining the Post Office land on which the hoardings were erected were in law part of the Post Office land, of which the appellant was not the rateable occupier; (4.) that the appellant was not the owner of the Post Office land, or the person permitting such land to be used for the exhibition of advertisements or for the erection of the hoardings within the meaning of s. 3 of the Act.

The respondents contended (1.) that the hoardings were on land "not otherwise occupied" within the meaning of s. 3 of the Act; (2.) that the appellant was the person permitting the hoardings to be used for the exhibition of advertisements, and that he was therefore liable to be rated under that section. The justices overruled the appellant's contentions, holding that the streets on which the hoardings and supports were erected were "land not otherwise occupied" within the meaning of s. 3 of the Act, and ordered the name of the appellant to be inserted in the rate.

The question for the opinion of the Court was, whether on the facts stated the appellant's name was rightly inserted in the rate.

Philbrick, Q.C., and *Alexander Glen*, for the appellant. Sects. 3 and 4 of the Act of 1889 (1) are correlative sections, and shew

(1) By s. 3 of the Advertising Stations (Rating) Act, 1889 (52 & 53 Vict. c. 27): "Where any land is used temporarily or permanently for the exhibition of advertisements, or for the erection of any hoarding frame post wall or structure used for the exhibition of advertisements but not otherwise occupied, the person who shall permit the same to be so used, or (if he cannot be ascertained) the owner thereof, shall be deemed to be in beneficial occupation of such land or part thereof, and shall be rateable in respect thereof to the relief of the poor and to all local rates, according to the value of such use as aforesaid."

By s. 4: "Where any land or hereditament occupied for other purposes, and rateable in respect thereof to the relief of the poor and local rates, is

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clearly what was the intention of the legislature in passing the Act. It was to impose a fresh liability upon "land" used for advertising purposes; and the word "land," as used in s. 3, includes all land which would be at law the subject of rating—that is to say, land which is capable of beneficial occupation, and which, if occupied, would be rateable. In the present case the hoardings were erected upon the street, which was neither occupied nor capable of occupation.

[A. L. SMITH, J. Then it is "land not otherwise occupied" within the meaning of s. 3.]

Assuming it to be so, the appellant is not the person liable. The liability is imposed upon the person permitting the "land" to be so used. The appellant did not let the land for advertising purposes, or permit it to be so used; he only let to the advertisement contractors the use of the hoardings on the land, and the persons permitting the land to be occupied by the hoardings are the persons liable under the section. If the land upon which the hoardings are erected is in occupation, the case falls within s. 4, and the owner, and not the appellant, is liable.

Jelf, Q.C., and *Fillan*, for the respondents, were not called upon.

MATHEW, J. I am of opinion that the decision of the justices was right, and must be affirmed. The language of the statute is perfectly plain, and I am unable to see the suggested difficulties in the way of the interpretation placed upon it. It is clear that the statute deals with two different descriptions of property: first, lands or hereditaments already rated and occupied; and secondly, land "not otherwise occupied." The latter class is provided for by s. 3, which enacts (to put it shortly) that, where land is not otherwise used than for the exhibition of advertisements, the person who permits it to be so used (not the person who puts up the hoarding) is to be deemed in beneficial occupa-

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used temporarily or permanently for the exhibition of advertisements, or for the erection thereon or attachment thereto of any hoarding frame post wall or structure used for the exhibition of advertisements, the gross and rateable value of such land or hereditament shall be so estimated as to include the increased value from such use as aforesaid.

tion of the land. There can be no doubt as to the appellant's position; it is clear; the land is not "otherwise occupied"; hoardings are erected on the land, which hoardings the appellant permits to be used for the exhibition of advertisements, and it is perfectly clear that under the Act he is to be deemed the person in beneficial occupation of the land.

It is argued, however, that we ought to go back to the appellant's title and investigate it, and see whether the Postmaster-General or the Commissioners of Sewers are not assessable in respect of this property; and our attention has been directed to the circumstances under which the appellant has acquired the right to use the hoardings. There is a contract between him and the Postmaster-General, by which the appellant agrees to maintain the then existing hoardings, and upon the completion of the work they are to become his property. No hoardings could be put in the streets without the permission of the Commissioners of Sewers, who granted their licence for their erection. It would be unreasonable, however, to hold that the Commissioners permitted the land to be used for the exhibition of advertisements simply because they granted this licence. The Postmaster-General is clearly not assessable, nor does he fall within the description in the section of a person permitting land to be used for the exhibition of advertisements; that description only applies to the appellant, who let the hoardings to advertisement contractors, and who did, therefore, in fact, permit the hoarding to be used for the advertisements.

A. L. SMITH, J. I agree, and should add nothing had I not been informed that this is the first case under this Act. I will, therefore, give shortly my view of the meaning of ss. 3 and 4. Those sections deal with two different cases of the use of land for exhibition of advertisements. Sect. 3 deals with land not occupied, and therefore not rateable, upon which hoardings have been erected; while s. 4 deals with land occupied, and therefore rateable: that is the salient difference between the two sections. In these sections the legislature points out the person who is to be assessable in each case. Under s. 3 the person permitting unoccupied and non-rateable land to be used for the exhibition

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of advertisements, is to be deemed to be in beneficial occupation; while under s. 4, where there is already a beneficial occupier, the liability to assessment remains the same as before, but the gross and rateable value are to include the profit arising from such use of the land. There can be no doubt as to the propriety of the decision in this case. The appellant is the person who permitted a hoarding placed upon unoccupied and therefore non-rateable land—that is, upon a public street—to be used for the exhibition of advertisements; he is, therefore, under s. 3, deemed to be in beneficial occupation, and is the person rateable under the Act.

Solicitors for appellant: *Nye, Greenwood, & Morton.*
Solicitors for respondents: *Webb & Sons.*

W. J. B.

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Nov. 4.

THE QUEEN *v.* BROCKLEHURST AND OTHERS.

Vaccination—Non-compliance with Vaccination Order—Summary Proceedings—"Further Proceedings"—Special Directions of Guardians—Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *s.* 31—*Local Government Board General Order*, 1874, *Art.* 16.

Where an order, under s. 31 of the Vaccination Act, 1867, has been made for the vaccination of a child under fourteen years of age, summary proceedings for the enforcement of the order may be taken under that section by the vaccination officer without obtaining special directions to that effect from the guardians of the union or parish within which the child was at the date of the order.

The proviso in art. 16 of the General Order of the Local Government Board, 1874, that "further proceedings" are not to be taken by the vaccination officer "in any case in which a vaccination order has already been obtained and summary proceedings taken under" s. 31, applies, not to the enforcement by summary proceedings of a vaccination order already duly obtained, but to proceedings for obtaining vaccination orders against a parent who has already been fined under s. 31 for disobeying an order to have his child vaccinated.

ORDER nisi calling upon justices to shew cause why they should not proceed to hear and determine the matter of a summons requiring one Alfred King to shew some reasonable grounds for his omission to carry into effect an order requiring him to have his child vaccinated.

From the affidavits it appeared that in September, 1890, William Bethell, the vaccination officer for the Horley district

of the Reigate Union, gave to Alfred King (who had been previously fined for non-compliance with an order for the vaccination of his child) the necessary statutory notice requiring him to have his child vaccinated, and that, King having neglected to comply with the notice, Bethell reported the case to the guardians on January 28, 1891, and asked for special directions; the guardians thereupon resolved that Bethell be authorized and empowered to take the necessary proceedings before the magistrates to compel King to comply with the law, and declared that that resolution should be deemed to be special directions to him in that behalf, pursuant to the provisions of art. 16 of the General Order of the Local Government Board of October 31, 1874. On February 3, Bethell laid an information under s. 31 of the Vaccination Act, 1867, against King, in which it was alleged that his child had not been vaccinated, and that the prescribed notices had been given and disregarded. Upon this information a summons was issued, which came on for hearing on February 14, when, upon production of the minute-book containing the resolution of the guardians, an order was made upon King to have his child vaccinated within twenty-one days. King did not comply with this order, and, having given no reasons for non-compliance, a summons was issued calling upon him to shew reasonable grounds for his omission, which came on for hearing on May 9. At the hearing the clerk to the justices took the objection that special directions of the guardians to take out this particular summons were necessary; and, it being admitted by the vaccination officer that he had obtained no further special directions beyond those in the resolution of January 28, the justices declined to make an order. The present order nisi was thereupon obtained on behalf of the guardians. (1)

(1) By s. 31 of the Vaccination Act, 1867 (30 & 31 Vict. c. 84), power is given to justices to make an order for the vaccination of any child under fourteen years within a certain time; "and if at the expiration of such time the child shall not have been so vaccinated, or shall not be shewn to be then unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such order shall have been made shall be proceeded against summarily, and, unless he can shew some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding twenty shillings."

By art. 16 of the General Order of the Local Government Board of October 31, 1874, made in pursuance of

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Macmorran, for the justices, shewed cause. The justices were right. The issue of the summons was clearly a contravention of the prohibition in art. 16 against taking further proceedings in a case where an order has been obtained without obtaining the special directions of the guardians. The further proceedings for the taking of which special directions are necessary are the summary proceedings under s. 31 of the Vaccination Act for the infliction of a penalty for disobedience.

Lumley Smith, Q.C. (*Burleigh Muir*, with him), for the guardians, in support of the rule. The proviso in art. 16 against taking further proceedings against the same person without special directions only applies where a vaccination order has been made and summary proceedings to enforce that order have already been taken against him. The provisions of s. 31 are clear: if a vaccination order is made and not complied with, the person upon whom it is made "shall" be proceeded against summarily; the vaccination order and the summary proceedings to enforce compliance with it are only two parts of one set of proceedings. The expression "further proceedings" in art. 16 does not mean the "summary proceedings" authorized by s. 31; it means a fresh start, and the article prohibits the taking without special direction of a second series of proceedings against a person who has already been fined. The object of the proviso was to prevent the taking of fresh proceedings from time to time

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powers given by 34 & 35 Vict. c. 98, s. 5, and 37 & 38 Vict. c. 75, s. 1, "The guardians are to give directions authorizing the officer to institute and conduct proceedings; but the officer is not to take further proceedings in any case in which an order has already been obtained and summary proceedings taken under this section until he shall have brought the circumstances of the case under the notice of the guardians and received their special directions thereon."

By a circular letter of the Local Government Board bearing the same date, and accompanying the said General Order, "The guardians may either give special directions in each individual case of default, or they may give such general directions as will enable the vaccination officer to take the proceedings in the first instance in every case of default without referring it to them; but the board have thought it right to require, as regards proceedings under s. 31, that the vaccination officers shall not, in any case in which a magistrate's order was made and summary proceedings taken thereon, apply for another order until they have brought the case before the guardians and received their special directions concerning it."

for continual disobedience, which, in *Allen* v. *Worthy* (1), were held to be good under s. 31 of the Act of 1867, without obtaining special directions from the guardians authorizing their being taken.

MATHEW, J. I am of opinion that this rule must be made absolute. An order was made to vaccinate a child, and the order was disobeyed. Thereupon a summons was taken out by the vaccination officer for the purpose of enforcing a penalty against the father. On the hearing of this summons the defendant did not appear; but it occurred to the magistrates' clerk that there was a difficulty in the way of making the order, and, turning to the rule of the Local Government Board, he came to the conclusion that special directions from the guardians to the vaccination officer were necessary before the proceedings could be taken. It was a fact that in this case no special directions had been given, and the justices thereupon declined to deal with the case. At first I was under the impression that they were right in so deciding; but upon a closer examination of the previous decisions and of the history of the rule, I have come to the clear opinion that they were wrong. It had been decided that there might be successive orders imposing fines upon a man for persistent refusal to have his child vaccinated. This was thought to be too oppressive; and after those decisions the rule of the Local Government Board was framed which we now have to interpret. If we examine its language critically, the meaning of that rule is manifest. It says, "in any case in which an order has been made and summary proceedings have been taken." What do those last words refer to? I think that they refer to the language of s. 31 of the Act, directing that upon non-compliance with a vaccination order the person shall be proceeded against summarily. The summary proceedings spoken of in the rule are the summary proceedings mentioned in the section. The meaning of article 16 is, that no order can be made inflicting a fine upon a man where there has been a prior order fining him, unless special directions are obtained by the vaccination officer from the guardians as to the new proceedings; and the case provided for

(1) Law Rep. 5 Q. B. 163.

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by the article is therefore not the present case. The rule must, therefore, be made absolute; but as the point was raised by the justices, it will be without costs.

A. L. SMITH, J. I entirely agree. The question is, what is the meaning of "further proceedings" in art. 16; and I think that the interpretation placed upon that expression by the guardians is right. Where a vaccination order has been obtained, it may be enforced by fine under s. 31 of the Vaccination Act without the necessity of obtaining any fresh directions from the guardians. But when that has been once done, and it is desired to take further proceedings against a man—that is, to obtain a second vaccination order and fine him a second time—the special directions of the guardians must be obtained before this can be done. The mistake of the justices has arisen from thinking that the expression "further proceedings" in art. 16 means the carrying out or enforcement for the first time of the original order to vaccinate. I agree that there should be no costs.

Order absolute.

Solicitors for justices: *Tyrrell & Son, for Head, Reigate.*

Solicitors for guardians: *Morrisons, for F. C. Morrison, Reigate.*

W. J. B.

THE ASSICURAZIONI GENERALI AND MESSRS. SCHENKER & CO. *v.* THE SS. BESSIE MORRIS CO., LIMITED, AND BROWNE.

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Feb. 8, 20.

Ship—Charterparty—Excepted perils—Disablement of Ship—Duty of Shipowner to repair Ship and complete Voyage.

Where a shipowner has agreed by charterparty that his ship shall proceed to a port of discharge and there deliver the cargo unless prevented by the excepted perils, and the ship has to put into a port of refuge for repairs, the shipowner is liable in damages for abandoning the voyage at such port without the consent of the charterer, unless the effect of the excepted perils proves to have been such as to make it either physically impossible to complete the voyage, or so clearly unreasonable as to be impossible in a business point of view. In order to justify the abandonment of the voyage on the latter ground, it must appear that the damage to the ship amounts to a constructive total loss.

ACTION tried before Collins, J.

The facts and arguments are sufficiently stated in the judgment.

Sir W. Phillimore and *Joseph Walton*, for the plaintiffs.

Barnes, Q.C. and *Hurst*, for the defendants.

Cur. adv. vult.

Feb. 20. COLLINS, J., delivered the following written judgment.

This is an action in substance by charterers against captain and shipowners for the sum of 424*l.* 14*s.* 9*d.*, alleged to be due from the defendants under two instruments dated Feb. 15 and 23, 1888, signed by the defendant Browne as master of the steamship *Bessie Morris* of which the first defendants on the record are owners. The instruments are set out and the circumstances under which they were given successively stated in the statement of claim.

"By the terms of a charterparty entered into in London between the plaintiffs Messrs. Schenker & Co. as charterers, and the defendants, the SS. "Bessie Morris" Company, Limited, and dated January 31, 1888, it was among other things agreed that the said steamship should proceed to Fiume and to one, two,

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three or four Adriatic ports, and there load a full and complete cargo of lawful merchandise and thence proceed to a safe port in the United Kingdom, and that freight should be paid by as much cash as the master might require for ship's disbursements at port of loading, not exceeding 200*l.*, to be advanced subject to three per cent. for interest and insurance, and remainder at port of discharge on unloading and true delivery of the cargo in cash at current rates of exchange, and that the captain of the said steamship should sign bills of lading as presented; but should the total freight shewn by bills of lading amount to less than the freight stipulated by the said charterparty the difference should be paid to the captain before sailing, and should the freight shewn by bills of lading amount to more than the freight stipulated in the said charterparty, the difference should be paid before sailing to charterers by captain's promissory note payable forty-eight hours after arrival at discharging port.

"In accordance with the said charterparty, the said vessel proceeded to Zante, Patras, and Fiume, and was loaded by the plaintiffs, Messieurs Schenker & Co., who, by their agent William Morphy, paid to or for the defendants and at their request the sum of 124*l.* 3*s.* 9*d.* for ship's disbursements at Zante and Patras, and the plaintiffs, Schenker & Co., paid a further sum of 120*l.* 11*s.* 3*d.* to or for the defendants at their request for ship's disbursements at Fiume. Bills of lading were signed by the defendant W. G. Browne, and the freight payable under such bills of lading amounted to more than the freight stipulated by the said charterparty, the difference amounting to 151*l.* 15*s.* 8*d.*

"The said defendant, W. G. Browne, for and in respect of the said disbursements and difference of freight, signed and gave to the said William Morphy on behalf of the plaintiffs and to the plaintiffs respectively, the two instruments of which the following are copies:—

"To W. Morphy, Steamship Agent.

Patras, February 15, 1888."

Forty-eight hours after arrival of my vessel the *Bessie Morris* at London, I promise to pay to the order of William Morphy, Esq., the sum of 124*l.* 3*s.* 9*d.* stg., received by me for necessaries

for which I hereby pledge my ship, freight and owners. (Signed in duplicate.)

William G. Browne,

124*l.* 3*s.* 9*d.*, stg. Master SS. *Bessie Morris.*

Fiume, Feb. 23, 1888.

"Forty-eight hours after arrival of my vessel SS. *Bessie Morris*, at London, I promise to pay to the order of Messrs. Schenker & Co. the sum of 272*l.* 6*s.* 11*d.* stg., being difference of freight and advance disbts. at Fiume, for which I hereby pledge my ship, freight and owners.

William G. Browne,

272*l.* 6*s.* 11*d.* Master."

"The said vessel afterwards proceeded upon her voyage to London, until at Gibraltar the defendants wrongfully abandoned the said voyage, and by reason thereof the said vessel never arrived at London.

"The said instrument of February 15, 1888, was, in consideration of the payment to the said William Morphy by the plaintiffs Schenker & Co., of the said sum of 124*l.* 3*s.* 9*d.* advanced by him as aforesaid, endorsed by him to the said plaintiffs.

"Afterwards on or about August 16, 1889, the said instruments were endorsed and assigned for valuable consideration to the plaintiffs the Assicurazioni Generali."

"The plaintiffs as to the said sum of 124*l.* 3*s.* 9*d.* and 120*l.* 11*s.* 3*d.* in the alternative claim the same as moneys lent by the plaintiffs Schenker & Co. to the defendants, and as moneys paid by the said plaintiffs to the defendants at their request.

"The plaintiffs as to the said sum of 151*l.* 15*s.* 8*d.* in the alternative say that the defendants have received the freight payable under the bills of lading signed as aforesaid, and they claim the said sum of 151*l.* 15*s.* 8*d.* as money received by the defendants for the plaintiffs Schenker & Co.

"In the further alternative the plaintiffs claim 424*l.* 14*s.* 9*d.* damages for the breach by the defendants of the said charterparty in abandoning the said voyage as hereinbefore alleged, whereby the plaintiffs Schenker & Co. were prevented from receiving the freight payable to them under the said bills of lading.

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"No part of the said sums hereinbefore mentioned has been paid by the defendants to the plaintiffs or either of them.

PARTICULARS.

1888		£	s.	d.	£	s.	d.
Feb. 15.	Disbursements at Zante and Patras . .				124	3	9
	Interest on the above from March 22, 1888, at 5 per cent.				9	0	0
Feb. 23.	Disbursements at Fiume	120	11	3			
	Difference of freight:						
	Freight shewn by bill of lading £1401 15*s.* 8*d.*						
	Chartered freight . . £1250 0 0	151	15	8			
					272	6	11
	Interest from March 22, 1888, at 5 per cent.				19	4	1
					424	14	9

The case was tried before me upon admissions and documents only. The vessel proceeded on her voyage to London on February 23, 1888. When near Gibraltar, on March 2, she went ashore, and was partially submerged. Of her cargo, which consisted of flour, barley, currants, and some oil, some was jettisoned, some was washed out, and the rest had to be taken out of her. The barley was found to be unmerchantable and in a state of rapid deterioration, the flour was to some extent sea-damaged, and so were some of the currants. All the barley and flour and a large quantity of currants were sold at Gibraltar under the advice of surveyors, and some of the currants and a small quantity of oil was sent on to London on two other steamers, viz., the *Chesapeake* and the *Derwent*, at a cost of 66*l.* 13*s.*; the original freight thereon being 113*l.* 10*s.* 7*d.*, which was paid by the consignees. A contract was made with salvors to get the ship off at an expense of 40 per cent. of her value delivered in Gibraltar. This service the salvors succeeded in accomplishing, and accepted 2900*l.* as their remuneration in respect thereof. She was then temporarily repaired at Gibraltar at an expense of 750*l.* These repairs was completed by April 25, and on that day she left Gibraltar for Oran, whence she procured a cargo of esparto grass for Garston, where she arrived on May 10, earning a freight of 572*l.* 10*s.* 11*d.* I gather from the admitted parts of the average statement that the vessel when so repaired might

have proceeded to London with the flour which was sold at Gibraltar together with the remainder of the cargo which was forwarded to London in other bottoms, and would have done so in ordinary course but for an arrangement with the cargo-owners or their underwriters, at whose instance the flour was sold at Gibraltar, and the whole bill of lading freight properly treated in consequence as paid thereon.

Under these circumstances, the question I have to decide is whether there is any liability upon the defendants, or either of them, to pay to the plaintiffs the amounts secured by the instruments above mentioned?

In the first place I must deal with some technical points raised by the defendants. They contended that the instrument of February 15 being made out in the name of Morphy, Schenker & Co. could not sue upon it, since not being a promissory note it was incapable of transfer by indorsement; and that for the same reason the Assicurazioni Generali could not sue on either of the instruments. This objection, even if valid, would only go to part of the cause of action, as one of the notes is made to Schenker & Co. themselves. I am of opinion, however, that the objection fails as to Schenker & Co. on the note of February 15 also, as they are entitled to sue in their own name on the contract made with their agent Morphy; and whether they are or not, they are clearly the proper persons to sue upon the charterparty. Next, it was said that the notes were given in excess of the master's authority, being in form contracts of hypothecation, and also being for a larger sum than the difference between bill of lading and lump freight. I do not think either of these objections will hold good. That part of the notes which purports to hypothecate may be rejected leaving that part which creates the personal liability intact. And by the tenor of the charterparty, the freight being payable partly in advances for disbursements, I think the difference between the bill of lading freight and the "freight stipulated by this charter," cannot be ascertained without taking these advances into account. It obviously must be so in the converse case of the lump freight being greater than the bill of lading freight, otherwise the charterer having made advances would be bound to pay

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over again. I think the limit of 200*l.* is one in favour of the charterer, and was capable of being waived by him.

Having disposed of these preliminary points, I come to the real question, which is one of much greater difficulty and importance, viz., can the plaintiffs succeed, the vessel, the *Bessie Morris*, never having arrived at London? This must depend on, first, whether there was any obligation on the defendants as between them and the plaintiffs to take her to London; and, secondly, whether anything has occurred to absolve them from such obligation if it existed. The master obviously could not by diverting the voyage, merely for the convenience of all the other persons interested, from London to some other point, defeat the plaintiffs' right, either to treat the vessel as having arrived in London, or to sue the defendants for not taking her there, unless under his contract the convenience of the other interests was the measure of his duty to the plaintiffs. It is necessary, therefore, to see what his duty to the plaintiffs was, and whether he has fulfilled it or been absolved from fulfilling it. I think the contracts of the notes are merely ancillary to the contract of the charterparty, and are made with reference to the contemplated performance of the obligations of the charterparty. Under that contract the master undertook that the *Bessie Morris* should proceed with the cargo to London, or so near thereto as she could safely get, and deliver the cargo unless prevented by some of the excepted perils. The duty of the shipowner where he is obliged to put into an intermediate port to repair is clearly stated by Lindley, J., in the case of *Hill* v. *Wilson*. (1) The question in that case was whether an adjustment made at a port of refuge, Copenhagen, was binding on the plaintiffs, who were holders of the bills of lading of part of the cargo. The learned judge says: "The duty of the shipowner is to complete the voyage if he can. If, owing to perils of the seas, he is compelled to put into an intermediate port for repair, his duty is to refit and carry on such part of the original cargo as is fit to be carried on. If this is done, a policy on the ship for the original voyage will cover a loss sustained after she has been repaired and is sailing from the port of repair to her

(1) 4 C. P. D. 329, at pp. 333, 334.

original port of destination; and a policy on her original cargo will still cover so much of such cargo as is being carried in her between the same ports. In a case of this description the original voyage is not regarded as broken up into two, viz., first, into one voyage from the port of sailing to the port of refuge, and secondly, into another voyage from such port to the port of destination. Again, if the shipowner, being unable to repair his ship, transhipps the cargo and sends it home in some other ship, which he may do, still, as between him and the original consignees of the cargo, the original voyage is treated as continuing, in the absence of some agreement to the contrary. This appears from *Shipton* v. *Thornton* (1), where the freight payable in such cases is discussed. Further, in a case of this description, a policy on the cargo for the original voyage will cover such cargo when transhipped in order to complete such voyage: 1 Arnould on Insurance, 2nd ed. p. 491. These considerations appear to me to shew that in order to uphold the Danish adjustment in this case as against the plaintiffs who have never assented to it, the defendants must prove two things, viz., first, that the original voyage was in fact terminated at Copenhagen; and, secondly, that it was so terminated either by agreement or by necessity, i.e. the occurrence of circumstances beyond the control of the defendants, and such as rendered the completion of the voyage on the terms originally agreed upon physically impossible, or so clearly unreasonable as to be impossible in a business point of view."

It would seem, therefore, that as against the plaintiffs who were not consulted, and who never agreed to it, the voyage was not properly determined at Gibraltar unless its completion on the original terms was either physically impossible or so clearly unreasonable as to be impossible in a business point of view. Repair in this case was clearly not a physical impossibility, for it was accomplished sufficiently to have enabled the *Bessie Morris* to proceed to London with so much of the cargo as was fit to go forward—viz., all the flour saved, and some of the currants and oil. Was it then so clearly unreasonable as to be impossible in a business point of view? I am not aware of any

(1) 9 Ad. & E. 314.

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case which has decided that any expense short of that which will establish a constructive total loss, i.e., an expense greater than the value of the ship and freight when repaired sufficiently to complete the voyage, would be so clearly unreasonable as to be impossible in a business point of view.

Maule, J., in *Moss* v. *Smith* (1) lays this down as the standard of reasonableness. He says (2): "It may be that the damages are irreparable with reference to the place where they happen; it may be they happen on some inhospitable shore, or some place where there is no harbour, or no means of obtaining workmen of requisite powers, or the necessary materials, and so that the repair is impracticable, and *that* is also a case of irreparable damage and a total loss; but short of that, it may be that the repairs are physically possible, or that the thing could be done, but that it cannot be done for any reasonable sum of money, and *that* is also a total loss; because in matters of business a thing is commonly treated as "impossible" when it is impracticable, and as "impracticable" when it cannot be done without laying out more money than the thing is worth. A man has "irreparably lost," it is said, a shilling he drops into very deep water, but he might recover it by laying out some thousands of pounds for a coffer dam or other contrivance to obtain it; so, if a ship sustains such damage as that, practically speaking, she cannot be repaired—that is to say, that no reasonable man would think of repairing her in consequence of the great expense of the repairs, then, *that* is treated as a total loss; it is in that way alone that the question of what a "prudent owner" would do, comes in. They are repairs which a "prudent owner" would not make, which, practically speaking, between an assured and underwriter, it is impossible to make; but if the owner can make them, if the repairs are practicable, then the ship is not totally lost. The ordinary measure which has been adopted is, if, when the ship is repaired, her value will not be so great as the money expended to get her into repair, the repairs are practically speaking impossible, and the ship irreparably damaged; and a ship irreparably damaged is totally lost."

No doubt an opinion is expressed in the judgment of

(1) 9 C. B. 94, at pp. 102, 103. (2) See 19 L. J. (C.P.) 225, at p. 228.

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Cockburn, C.J., and Mellor, J., in *Attwood* v. *Sellar* (1), that the shipowner is not bound as between him and the charterer to do any repairs at all, and Parke, B., in *Worms* v. *Storey* (2), seems to countenance the same view; but Lord Blackburn in *Svendsen* v. *Wallace* (3) referring to this opinion says: "Cockburn, C.J., seems to think that in all cases where the ship is disabled, whether she can be repaired or not, the original contract is dissolved and a new one formed by law. This seems to me in direct conflict with the two decisions I have just "cited"—viz., *Rosetto* v. *Gurney* (4), and *Shipton* v. *Thornton.* (5) At an earlier part of the same judgment (6) he says: "The ordinary contract between shipowner and merchant is that the goods shall be carried to their destination, and shall there be delivered, unless prevented by the excepted perils; and this generally should be done in the original ship. Whenever the ship is disabled, it must, in order literally to fulfil this contract, be necessary to repair the ship so as to make her fit to carry on the cargo, and if any part of the cargo has been taken out to reship it." The weight of opinion, therefore, clearly is against the view that disablement capable of repair dissolves the contract. If it does not it is difficult to see what degree of injury, short of a constructive total loss, could be said to excuse the shipowner from performing the obligation of the charterparty to proceed and deliver in a case where the cargo is not perishable, and the repairs can be executed within a reasonable time: see *The Blenheim.* (7)

I infer in this case that the delay would not have been unreasonable. The steamer was repaired in about six weeks, and I gather from the average statement that but for the agreement of the parties a substantial part of the cargo would, in the *ordinary course,* have gone forward in her to London. And from the fact that full freight on 3,862 bags of flour sold at Gibraltar is allowed for, I think it may fairly be assumed that the conditions which alone would entitle the shipowner to such freight

(1) 4 Q. B. D. 342, at p. 358.
(2) 11 Ex. 427, at pp. 429, 430.
(3) 10 App. Cas. 404, at p. 418.
(4) 11 C. B. 176.
(5) 9 Ad. & E. 314.
(6) 10 App. Cas. 404, at p. 417.
(7) 10 P. D. 167.

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at an intermediate port were fulfilled, viz., that having the option of letting it go on, the cargo-owner elected to take delivery at an intermediate port (see *Hunter* v. *Prinsep* (1), and *Hill* v. *Wilson*. (2)) In *Mavro* v. *Ocean Marine Insurance Co.* (3) Cockburn, C.J., treats the duty of the master to repair in order to continue the voyage as one existing between him and the shipowner only; but this view is quite opposed to the law as laid down by Lindley, L.J., in the passage from *Hill* v. *Wilson* (4) above cited, where it is expressly stated as lying on the owner, and the opinion of Cresswell, J., in *Moss* v. *Smith*. (5) In *Wilson* v. *Bank of Victoria* (6) Blackburn, J., leaves the question open whether an action will lie at the suit of the owner of the cargo against the shipowner for a failure on the part of the master to repair at a moderate cost when he might by so doing have brought the cargo home. But between the charterer and the owner the contract is that the ship shall proceed to the port of discharge unless prevented by the excepted causes. It is difficult to see, therefore, why any evidence that would not suffice to prove loss of freight through damage to the ship by the perils of the seas, would suffice to prove a prevention by the like perils from proceeding on the voyage. It is clear from *Moss* v. *Smith* (7), and *Philpot* v. *Swann* (8) that unless the ship is either irreparable or repair practically impossible, the shipowner cannot shew as against his underwriter that he was prevented from earning the freight through damage to the ship, and the standard of what is practically impossible is the same as that of a constructive total loss. In other words, where the freight is said to be lost through damage to the ship, it must be shewn that the ship itself to which the freight is an accessory was actually or constructively lost. I am unable to see why in principle the question whether the vessel has been prevented from proceeding on her voyage by the excepted perils, should not be tried by the same standard.

(1) 10 East, 378, at p. 394.
(2) 4 C. P. D. 329.
(3) Law Rep. 10 C. P. 414.
(4) 4 C. P. D. 329, at pp. 333, 334.
(5) 9 C. B. 94, at p. 106.
(6) Law Rep. 2 Q. B. 203, at pp. 211, 212.
(7) 9 C. B. 94.
(8) 30 L. J. (C.P.) 358.

In *Benson* v. *Chapman* (1), Alderson, B., in delivering the opinion of the Judges, says: "The master is bound to repair if there be a reasonable prospect of doing so at an expense not ruinous." Willes, J., in *Blasco* v. *Fletcher* (2) treats this as referring to the duty of the master to his owner only; but Brett, J., in his observation in the argument in *Mavro* v. *Ocean Marine Insurance Co.* (3) seems hardly to regard it as so limited. No doubt in *Benson* v. *Chapman* (1), the question was whether the owner was bound by the act of the captain; but if his duty towards his owner be to repair at an expense not ruinous, yet clearly unprofitable under the circumstances, it would seem that it must be because by so doing he enables his owner to fulfil his obligations to others and so escape the consequences of a breach. Mr. Carver, in his excellent work on 'Carriage by Sea' (2nd ed. s. 303, p. 312), thus sums up the effect of the authorities: "On the whole, the true view seems to be that the shipowner is still bound by his contract, if he has only temporarily been prevented from completing it, and the obstacle can be removed without unreasonable sacrifice on his part."

In my opinion, therefore, the defendants in this case might have repaired the ship so as to carry forward a substantial part of the cargo to its destination in London without unreasonable sacrifice and without unreasonable delay, and consequently were not absolved from their obligation to do so, and having without necessity and without the consent of the plaintiff broken up the voyage at an intermediate point, cannot pray in aid their own act in not proceeding to London as an answer to the action, and the plaintiffs are therefore entitled to the benefit of the defendants' promise just as though the ship had reached London in fact. No set-off or counter-claim has been pleaded or proved, and I have not the materials for deciding whether any exists. In my opinion the amount payable by the defendants under the circumstances is the same, whatever be the form in which the cause of action is expressed. The view I have taken renders it unnecessary to consider what effect the fact might have had

(1) 2 H. L. C. 693, at p. 720.
(2) 14 C. B. (N.S.) 147, at p. 158; 32 L. J. (C.P.) 284.
(3) Law Rep. 9 C. P. 595, at p. 601.

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that with some of the cargo the voyage was completed, London reached, and the full freight earned though not in the same ship. My judgment must, therefore, be for the plaintiffs, with costs against both the defendants.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*

Solicitors for defendants: *Field, Roscoe & Co., for Bateson, Warr, & Bateson, Liverpool.*

H. D. W.

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Feb. 1.

KILPIN *v.* RATLEY. RATLEY, CLAIMANT.

Gift—Verbal Gift of Chattels—Delivery to Donee—Change of Possession Consequent upon Gift—Passing of Property.

Household furniture which was the property of the claimant's father was in the possession of the claimant's husband, and was in a house where the husband resided with his wife, the claimant. The father, being at the time with the claimant in a room where some of the furniture was, verbally gave the furniture to the claimant by words of present gift. The father then went away from the house leaving the claimant in the room. There was no manual delivery of the furniture to the claimant, and after the gift the furniture still remained in the house where the claimant and her husband continued to live:—

Held, that manual delivery of the furniture was not necessary to complete the verbal gift, and that there had been such a change of possession from the claimant's husband to the claimant, consequent upon the gift, as was sufficient to effectuate it.

INTERPLEADER. Appeal from county court of Buckinghamshire, holden at High Wycombe.

The claimant, Mrs. Ratley, claimed certain household furniture which had been seized by the execution creditor, Kilpin, under an execution issued upon a judgment obtained by him in the county court against Ratley, the husband of the claimant. The furniture was seized in the house at High Wycombe, in which Ratley and the claimant were residing together. The claimant was the daughter of one Purser, and was married to Ratley in 1886. In 1890, Ratley got into pecuniary difficulties, and thereupon, by an arrangement between him and his creditors and Purser, it was agreed that Purser should pay to the creditors six shillings in the pound on the amounts of their debts, and that in consideration thereof Ratley should assign his property,

including the furniture in question, to Purser. This arrangement was duly carried out, and a deed of assignment was executed by Ratley and registered; but, until the seizure under the above execution, the furniture remained in the house in which Ratley and the claimant lived. In support of the claim, evidence was given by Purser and Mrs. Ratley, the claimant, that after the assignment to Purser, and some time before the execution, he went over to High Wycombe from Nottingham, where he lived, and that he gave the furniture to the claimant upon the spot. Purser said: "I afterwards gave to my daughter the furniture which was in the house in which she and Ratley lived. I said to her, 'I give you this furniture; it will be something for you.' I left her and the furniture in the house and went back to Nottingham." The claimant said: "The furniture he gave me at our house. He said, pointing to the furniture in the room, 'I give you this furniture; it will be something for you.' He afterwards left, and the furniture remained in the house where I lived."

The county court judge held that the furniture had passed to Purser under the assignment to him by Ratley, and that there had been a valid and effectual gift of the furniture by Purser to the claimant, with such delivery and change of the possession of the furniture as was reasonably practicable in the circumstances. Judgment was accordingly given for the claimant.

The execution creditor appealed.

Macaskie, for the execution creditor. It must be admitted, that if there had been a claim by Purser there would have been no answer to it; but the claimant relies on a mere verbal gift to her by Purser, and there is no evidence that there was any delivery of the furniture to her. The property therefore did not pass to the claimant: *Irons* v. *Smallpiece* (1); *Shower* v. *Pilck* (2); *Cochrane* v. *Moore* (3); *Danby* v. *Tucker* (4) was disapproved in *Cochrane* v. *Moore*. (3)

Germaine, for the claimant. Delivery of the article is not necessary; all that is requisite is delivery of possession to the

(1) 2 B. & A. 551.
(2) 4 Ex. 478; 19 L. J. (Ex.) 113.
(3) 25 Q. B. D. 57.
(4) 31 W. R. 578.

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donee; therefore, delivery first and gift afterwards is as effectual as gift first and delivery afterwards, per Fry, L.J., in *Cochrane* v. *Moore* (1); *Alderson* v. *Peel.* (2)

[WILLS, J., referred to *Winter* v. *Winter.* (3)]

Here Purser did all that he could to effect delivery of possession to the claimant.

HAWKINS, J. I am of opinion that this appeal must be dismissed. There can be no doubt, and indeed it is not disputed, that there was a gift of this furniture to the claimant. The only objection that has been raised is that the gift was not completed by delivery of the furniture. I think that there was a sufficient delivery. The test of that is, was possession given and taken under the gift? I can see little more which Purser could have done to complete the gift. He seems to have come over from Nottingham to take possession of the furniture which had become his property by virtue of the assignment, and which, if it remained in Ratley's possession up to that time, remained in his hands only as being bailee for Purser. Purser's action was first to give the furniture to the claimant, and then to leave her in the room with the furniture and to go back to Nottingham. She did occupy the rooms and use the furniture, although Ratley no doubt lived in the house. The mere fact that Ratley lived there did not prevent the possession of the furniture being in her. I am at a loss to see what more could have been done to transfer the possession to her, unless, as has been contended, it was necessary that there should be a manual delivery of the furniture. The expressions in the judgments in *Irons* v. *Smallpiece* (4) and *Shower* v. *Pilck* (5) shew that what the learned judges in those cases had in their minds was the necessity for words of present gift and for a transfer of possession. What the Court said in the latter case was, that by the words "I *will* give you," that is to say, "I will upon some future day give you," no property passed. But it is a totally different thing when a person says, "I give you *now*," and then leaves the donee in

(1) 25 Q. B. D. at pp. 69, 70.
(2) 7 Times L. R. 418.
(3) 4 L. T. (N.S.) 639.
(4) 2 B. & A. 551.
(5) 4 Ex. 478; 19 L. J. (Ex.) 113.

possession of the thing. There are two cases which abundantly support our decision in this case. One is *Winter* v. *Winter* (1), which has been referred to by my learned brother. In that case there was no actual delivery of the possession of the barge to the donee upon the gift; but the donee, having been previously in possession of the barge as servant of the donor, kept possession of it afterwards and worked it as his own. I cannot see any substantial distinction between that case and this. The other case is *Alderson* v. *Peel* (2), which also strongly fortifies the view which I take.

WILLS, J. I am of the same opinion. There is no doubt that a gift by word of mouth requires to be completed by delivery of the thing given. If delivery necessarily means an actual manual handling of the articles given, then there is in this case no evidence that this was done. If the Court of Appeal meant in *Cochrane* v. *Moore* (3) to lay down a rule that it is necessary in every case to touch and hand over the article given, we should, of course, follow that decision in this case; but I cannot think that the learned judges intended so to do. I think that the delivery spoken of is a delivery of possession. If the possession is changed in consequence of a verbal gift—as where the possession has been held in one capacity up to the time of the gift, and from that time it is held in another capacity—in this case as owner—I think that the gift is completed. In my opinion, there was here a change of possession consequent upon the gift. *Winter* v. *Winter* (1) and *Alderson* v. *Peel* (2) go farther than it is necessary for us to go in this case. It may possibly be that *Alderson* v. *Peel* (2) is not consistent with *Cochrane* v. *Moore* (3); but, however that may be, I do not think that *Winter* v. *Winter* (1) conflicts with *Cochrane* v. *Moore* (3), nor that the Court of Appeal meant in the latter case to overrule *Winter* v. *Winter* (1). It is to be noted, that although *Danby* v. *Tucker* (4), and the law as enunciated by Cave, J., in *In re Ridgway* (5), are specifically disapproved in *Cochrane* v. *Moore* (3), there is no expression of a like kind as to *Winter* v. *Winter*. (1)

(1) 4 L. T. (N.S.) 639.
(2) 7 Times L. R 418.
(3) 25 Q. B. D. 57.
(4) 31 W. R. 578.
(5) 15 Q. B. D. 447.

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In the present case up to the time of the gift the furniture was in the possession of the husband; it was in the house where the husband lived, and where the claimant as his wife was by right living. Then her father having upon the spot pointed to the furniture and intimated that he gave it to her as it stood, it remained in the house as before. But the furniture was no longer in the possession of the husband, but of the wife. Purser meant that the furniture should be thenceforth in the possession of the claimant; and it seems to me that she was in possession of it under such circumstances as to afford sufficient indicia of her property in the furniture. It cannot have been necessary to move the furniture out of the house. As the claimant was living in the house, there was, in my opinion, abundant evidence to support the learned county court judge's finding. I think that the gift was accompanied by a delivery of possession sufficient to satisfy all requirements, and that it was not necessary that Purser should go through the mere formality of handling the furniture in order to complete the gift. This appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitor for the claimant: *Rutland, for Wood, High Wycombe.*
Solicitors for the execution creditor: *Harcourt & Son.*

P. B. H.

IN RE VINCE. EX PARTE THE TRUSTEE IN BANKRUPTCY. 1892 Feb. 15.

Partnership—Contract—Loan to Trader — Interest varying with Profits — Allowance by Lender on inability to pay Interest out of Profits—Enforcement of Allowance—Bankruptcy of Borrower—Proof of Debt—Postponement—Partnership Law Amendment Act, 1865 (28 & 29 *Vict. c.* 86), *ss.* 1, 5.

Under a written agreement containing a statement of the existing assets and liabilities of a trader in his business, and a provision that such statement should be the basis of a proposed loan to him, a loan was made to such trader at a fixed rate of interest. The agreement provided that in the event of the borrower being unable to pay any portion of the interest by reason of the deficiency of his profits, a due allowance should be made by the lender to the borrower in respect of the same. The borrower having become bankrupt:—

Held, that s. 5 of the Partnership Law Amendment Act, 1865 (28 & 29 Vict. c. 86; see now 53 & 54 Vict. c. 39, s. 3), applied to the lender's claim in the bankruptcy, and that such claim must, therefore, be postponed until the claims of the other creditors were satisfied, inasmuch as the loan was an advance at a rate of interest varying with the profits, within s. 1 of that Act (see now 53 & 54 Vict. c. 39, s. 2, sub-s. 3 (*d*)), because the Court might have enforced an allowance by the lender where the borrower was unable to pay the fixed rate of interest out of the profits of the business.

APPEAL from an order in bankruptcy of the judge of the county court of Norfolk, holden at Norwich, directing a trustee in bankruptcy to admit the proof of a creditor to rank for dividend in the like manner as the claims of the other creditors against the estate of the bankrupt.

In October, 1889, John Vince, who was carrying on business as a corn merchant at East Dereham, in the county of Norfolk, applied to Dudley Baxter for a loan of money. Thereupon, John Vince and Dudley Baxter entered into an agreement in writing, the material provisions of which are hereunder set forth.

An agreement made and entered into this 28th day of October, 1889, between John Vince of the one part and Dudley Baxter of the other part: Whereas by recent audit of the books of account of the trade and business of John Vince, there appears, according to the statement thereof signed by John Vince, that there is now due to him for credits 4252*l.* 18*s.* 5*d.*, and liabilities owing by John Vince 2698*l.* 6*s.* 9*d.*, which he hereby agrees to discharge within three months, and there are no other debts or incumbrances in any way affecting the same, as John Vince doth

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hereby declare, which is hereby agreed shall be the basis of the proposal hereinafter made. And whereas John Vince has accordingly requested Dudley Baxter to lend and advance him the sum of 4500*l.*, which sum Dudley Baxter has agreed to advance upon the terms and in manner hereinafter appearing. It is hereby agreed for the considerations aforesaid, and in consideration of the said sum of 4500*l.* paid to John Vince by Dudley Baxter, that John Vince shall and will punctually pay interest on the same to Dudley Baxter by two regular half-yearly payments, on the 28th of April and the 28th of October in each year, of 462*l.* 10*s.* for every half-year. And that in case John Vince should be unable to pay unto Dudley Baxter any portion of the half-yearly payments upon any part of the said sum of 4500*l.*, by reason of the deficiency of the profits of John Vince, then and upon every such occasion a due allowance shall be made by Dudley Baxter to John Vince in respect of the same in a fair and reasonable manner.

The sum of 4500*l.* was advanced by Dudley Baxter to John Vince upon the signing of the above agreement.

Upon the 20th of January, 1891, a receiving order upon a creditor's petition was made against John Vince; and he was subsequently thereon adjudicated a bankrupt.

Dudley Baxter tendered a proof in the bankruptcy for the sum of 2399*l.* 18*s.* 3*d.*, as the balance due to him under the above agreement. The trustee in bankruptcy rejected the proof except for the purpose of ranking for a dividend after all the other creditors had been paid in full. The grounds upon which the trustee rejected the proof were, that the advance was an advance of money by way of loan to a person engaged or about to engage in business on a contract in writing with that person that the lender should receive a rate of interest varying with the profits; and that the case therefore fell within the provisions of ss. 1 and 5 of the Partnership Law Amendment Act, 1865 (28 & 29 Vict. c. 86), commonly called Bovill's Act. Upon an appeal by Baxter from the trustee's decision, the county court judge reversed that decision, and ordered that the trustee should admit Baxter's proof to rank for dividend with the claims of the other creditors against the estate. The trustee appealed.

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Muir Mackenzie, for the trustee in bankruptcy. This was a loan at a rate of interest varying with the profits of the bankrupt's business; therefore ss. 1 and 5 of Bovill's Act (28 & 29 Vict. c. 86) (1) are applicable, and Baxter's proof should only have been admitted to rank after the claims of the other creditors had been satisfied. The recitals shew that the profits of the business were the basis of the agreement under which the loan was made, and the clause providing for the "due allowance" to the bankrupt has reference clearly to inability to make the payments of interest at the prescribed rate, which was something over 20 per cent., out of the profits. Although the variation was to operate only by way of reduction of the interest, yet, as the fixed rate of interest was very high, this substantially made the rate of interest dependent upon the profits. The county court judge treated the provision for an allowance to the bankrupt as mere surplusage; but that is not the proper construction of the agreement. [He cited *Ex parte Mills, In re Tew* (2); *Ex parte MacArthur, In re Ramsden* (3); *Ex parte Sheil, In re Lonergan* (4); *In re Stone* (5); and the judgment of Stirling, J., in *Badeley* v. *Consolidated Bank* (6), not varied upon this point by the Court of Appeal. (7)]

[VAUGHAN WILLIAMS, J. What do you say is to be the standard of reduction in the rate of interest?]

The amount of the allowance will depend upon the amount of the profits actually realized as compared with the full amount of profits at the date of the agreement.

Cooper Willis, Q.C., and *Eversley*, for Baxter. Bovill's Act is a penal statute to be strictly construed: *Ex parte Sheil, In re Lonergan* (8); strict proof that the case is within the Act is required from the trustee. If the fixed rate of interest had been so high as to shew that the agreement to pay it was a mere device, it would not have been disputed that the agreement would have been within the Act; but no such case has been

(1) See now the similar provisions in the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2, sub-s. (3) (*d*), s. 3.
(2) Law Rep. 8 Ch. 569.
(3) 40 L. J. (Bank.) 86.
(4) 4 Ch. D. 789.
(5) 33 Ch. D. 541.
(6) 34 Ch. D. 536, 547.
(7) 38 Ch. D. 238.
(8) 4 Ch. D. at p. 792, per Jessel, M.R.

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made. "Due allowance" may mean an allowance in time only by a postponement of payment. The variation to which the Act applies must be a variation operating by way of increase in the rate of interest as well as by way of reduction. It must be a variation under all circumstances, not a mere conditional variation such as that in this case. In all the cases cited, and in *Ex parte Taylor. In re Grason* (1), there was a variation both up and down with the profits. This case stands upon an entirely different footing from cases in which there is a stipulation for a share of the profits plus a fixed sum as interest.

Next, "due allowance" merely means what Baxter would be willing to allow, not a sum which the bankrupt could have demanded. No Court would have enforced an allowance, and there was no standard by which the allowance could be measured: *Manby* v. *Gresham Life Assurance Co.* (2)

VAUGHAN WILLIAMS, J. I am of opinion that this appeal should be allowed. The whole of the case made on behalf of Baxter comes to this. It is contended that Bovill's Act has no application to a case where the rate of interest varies downwards only. I think that that contention is wrong. In my view that Act applies whether the variation be upwards and downwards—that is, above and below a fixed rate—or only downwards. I do not say that it is impossible that there should be an agreement so drawn as to provide for a variation downwards only and yet not to fall within the Act; but it would have to be framed in such a way as to exclude the payment of interest out of profits. But directly you come to an agreement like this, where it is contemplated that the interest is to come out of profits, then the fact that the agreement provides that the rate of interest shall vary only below a fixed point will make no difference. I will put this case. Suppose an agreement which provides that interest at the rate of 5 per cent. shall be paid half-yearly. (I am putting such a moderate rate of interest as it would be reasonably within the competence of an ordinary business to yield.) And suppose that agreement goes on to provide "or such other rate of interest as may be reasonable having regard to the

(1) 12 Ch. D. 366. (2) 29 Beav. 439; 31 L. J. (Ch.) 94.

profits of the business." The moment you introduce "profits" you shew that a payment out of profits is intended, because a reduction of interest is to occur if the profits are insufficient. It is conceded that an agreement like that is clearly within the Act. How does that agreement differ from this? Only in this way: a condition is here introduced upon which the reduction is to depend. If the profits are insufficient, then there is to be a right to a reduction. It seems to me that that distinction does not take the case out of the Act.

Here it was contemplated that payment of interest was to be made out of profits. Starting then with the premise that the fact that the variation is only one way is immaterial, nothing remains but to see whether the reduction is such as the Court would enforce. In other words, it only remains to see whether, the interest not being paid, Vince could compel Baxter to make a reduction in the rate of interest having regard to the circumstances of the case. I think that if the Court were of opinion that the non-payment of interest was due to a falling off in the profits the Court would go on to fix a fair reduction. To do that the Court would have to consider what were the circumstances as regards the amount of the profits which in the expectation of the parties at the time of the agreement the business would have realized. I see no reason why the Court should not do that. I am of opinion accordingly that in this case the agreement was an agreement under which the rate of interest varied with the profits within the meaning of Bovill's Act. The decision of the learned county court judge must, therefore, be reversed.

COLLINS, J. I am of the same opinion. The first point which has been made is that because there is a fixed maximum this cannot be a case of a rate of interest varying with the profits. That point cannot, I think, be sustained. The agreement between the bankrupt and Baxter provided for payment of interest to the latter at the rate of something over 20 per cent. It may be conceded that in the circumstances of the case this may not have been an abnormal rate of interest having regard to the profits of the business. If so, what is the effect of the introduction of this variation operating only below that fixed rate? It

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IN RE VINCE. EX PARTE TRUSTEE IN BANKRUPTCY.

Collins, J.

must be taken that the fixed percentage exhausts the probabilities as to the earning powers of the business, and in effect, therefore, the agreement provides for a rate of interest varying with the rate of profits, although the variation operates only downwards. But a point has been made which raises a more substantial difficulty. To some extent, however, I feel relieved from this difficulty by the course which the argument before us has taken. Neither of the counsel for the creditor disputed that the inability referred to in the clause providing for the reduced rate of interest meant inability to pay the interest out of profits. That being conceded, the agreement becomes easy of construction. If the source from which the interest is to be paid is the profits of the business, and if the inability is to be an inability to make the payments out of profits, then, I think, the agreement does give a reasonable standard for the allowance. I would, therefore, read the agreement as if the words "out of profits" were inserted after the words "unable to pay." Reading the agreement thus, "due allowance" must mean due allowance with reference to what was in the contemplation of the parties at the time when the agreement was entered into, that is, interest at the rate of something over 20 per cent. Then there can be no great difficulty in ascertaining what the allowance should be, it being remembered that the inability to pay interest at the fixed rate is to be occasioned by inability to pay it out of profits. It seems to me, therefore, that the effect of this agreement was to tie the lender to the profits. The agreement expressly provides that the statement founded upon the recent audit of the business should be the basis of the advance. That being so, in my opinion counsel were right in conceding that payment of the interest was to be a payment out of profits; and when that is conceded, the conclusion at which we have arrived follows, I think, without difficulty.

Appeal allowed.

Solicitors for the trustee in bankruptcy: *Crowders & Vizard.*

Solicitors for Baxter: *F. J. & G. J. Braikenridge, for Nevill & Atkins, Tamworth.*

P. B. H.

EVANS *v.* HOARE AND ANOTHER.

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March 14, 15.

Frauds, Statute of — Agreement not to be performed within a Year—Memorandum in Writing—Signature—Name of Party to be charged inserted in Body of Agreement—29 Car. 2, c. 3, s. 4.

Where there is a memorandum in writing of an agreement, containing the name of the party sought to be charged, inserted in some part of the memorandum by such party, or his authorized agent, as being a party to the agreement, and such memorandum is presented for signature to the other party, there is a sufficient signature, within s. 4 of the Statute of Frauds, to bind the party sought to be charged.

A memorandum of an agreement that plaintiff should serve defendants for three years—in the form of a letter from plaintiff, addressed to defendants, whose name appeared at the beginning of the letter—was written by defendants' agent with their authority, and presented to plaintiff for signature, and signed by plaintiff.

In an action for wrongful dismissal :—

Held, that defendants' name, inserted in the letter by their authorized agent, amounted to a signature binding on defendants, within s. 4 of the Statute of Frauds, and that plaintiff was entitled to recover.

APPEAL by the plaintiff from the judgment of the assistant judge of the Mayor's Court.

The action was brought to recover damages for wrongful dismissal. In 1886 the plaintiff entered into the service of the defendants, as ledger clerk, at a salary of 80*l.* a year. On two subsequent occasions his salary was raised 10*l.*, bringing it up to 100*l.* a year. On February 19, 1890, the following document was drawn up by a clerk of the defendants named Harding, who was acting with the defendants' authority, and presented by Harding to the plaintiff for signature, and signed by the plaintiff.

"5 Campbell terrace, Cannhill Road, Leytonstone, E.,
"Feb. 19, 1890.

"Messrs. Hoare, Marr & Co., 26, 29, Budge Row,
"London, E.C.

"Gentlemen,—"In consideration of your advancing my salary to the sum of 130*l.* per annum, I hereby agree to continue my engagement in your office for three years, from and commencing January 1, 1890, at a salary at the rate of 130*l.* per annum aforesaid, payable monthly as hitherto.

"Yours obediently,
"George E. Evans."

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Afterwards the defendants dismissed the plaintiff from their service.

At the trial the jury found a verdict for the plaintiff for 34*l.* 13*s.* 4*d.* damages; but the assistant judge, being of opinion that the document of February 19, 1890, was an agreement that was not to be performed within the space of one year from the making thereof, and was not signed by the defendants or any other person by them lawfully authorized, and that therefore the plaintiff was prevented from recovering by s. 4 of the Statute of Frauds (29 Car. 2, c. 3), gave judgment for the defendants.

Mar. 14. *Crump, Q.C.* (*Leslie Probyn*, with him), for the plaintiff, in support of the appeal. In any case, the plaintiff is entitled to recover something, for some money had been earned; but the true view of the case is that the Statute of Frauds affords no defence, on two grounds. In the first place, when the document of February 19, 1890, was drawn up there was already a valid verbal contract of service in existence. The plaintiff can disregard the document, and sue on the contract to employ him entered into in 1886. This distinguishes the present case from *Britain* v. *Rossiter*. (1) Secondly, the case is not within the Statute of Frauds, because the document of February 19, 1890, is duly signed by a person authorized by the defendants. The decisions shew that the signature need not be at the foot or end of the document. It is sufficient if the name of the party to be charged is written at the beginning, or anywhere in the body of the document by the party himself or some other person duly authorized, provided it appears that it is intended to designate the party to be charged, and that it applies to and governs all the material and operative provisions of the contract: *Schneider* v. *Norris* (2); *Caton* v. *Caton* (3); *Godwin* v. *Francis* (4); *Jones* v. *Victoria Graving Dock Co.* (5)

[DENMAN, J. Does the defendants' name, in this document, govern every material and operative part of the contract?]

Yes. It was written by Harding, with the defendants' authority,

(1) 11 Q. B. D. 123.
(2) 2 M. & S. 286.
(3) Law Rep. 1 Ch. 137; Law Rep. 2 H. L. 127.
(4) Law Rep. 5 C. P. 295.
(5) 2 Q. B. D. 314.

with the intention of designating the party to be charged, and for the purpose of making a contract which should be binding on the plaintiff.

[DENMAN, J., referred to *Bleakley* v. *Smith* (1); *Hubert* v. *Treherne.* (2)]

Witt, Q.C. (*Tatlock*, with him), for the defendants. The plaintiff must rely on the written agreement; otherwise he has no remedy. No doubt that agreement is signed by the plaintiff in such a manner that it would be binding on him; but it does not follow that it is binding on the defendants: *Reuss* v. *Picksley.* (3) The document merely amounts to a letter addressed to the defendants, containing a proposal which they might accept or refuse, but is in no way binding on them. Their name was inserted, not as a signature, but for the purpose of indicating the party to whom the plaintiff's proposal was intended to be addressed. There is, therefore, no signature which can be binding on the defendants, and the plaintiff is not entitled to recover: *Saunderson* v. *Jackson* (4); *Tourret* v. *Cripps.* (5) In the cases relied on for the plaintiff the document was sent out as a contract by the party sought to be charged.

Crump, Q.C., replied.

Cur. adv. vult.

March 15. The following judgments were delivered:—

DENMAN, J. This was an action for wrongful dismissal. The plaintiff entered the defendants' service as a ledger clerk at 80*l.* a year; the salary was twice raised 10*l.* a year until it reached 100*l.* On February 19, 1890, the plaintiff signed an agreement as follows:—

"5, Campbell Terrace, Cannhill Road, Leytonstone,
"Feb. 19, 1890.

"Messrs. Hoare, Marr & Co., 26, 29, Budge Row,
"London, E.C.

"Gentlemen,—In consideration of your advancing my salary to the sum of 130*l.* per annum, I hereby agree to continue my

(1) 11 Sim. 150.
(2) 3 M. & G. 743.
(3) Law Rep. 1 Ex. 342.
(4) 2 B. & P. 238.
(5) 48 L. J. (Ch.) 567.

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engagement in your office for three years, from and commencing January 1, 1890, at a salary at the rate of 130*l.* per annum aforesaid, payable monthly as hitherto.

"Yours obediently,

"George E. Evans."

If this agreement was within s. 4 of the Statute of Frauds, the judgment was justified. The learned judge gave judgment for the defendants on the ground that the document was not signed within that section. This decision would be right unless the words "Messrs. Hoare, Marr & Co.," at the commencement, can, under the circumstances, be held to be "a signature by a person authorized thereunto by the defendants." In fact, the document was drawn up by one Harding, who was authorized by the defendants to draw it up and take it, in its present shape in all other respects, for the plaintiff's signature. It appears to me that the case falls within the principle of the decisions cited in favour of the plaintiff, especially *Schneider* v. *Norris* (1), and *Jones* v. *Victoria Graving Dock Co.* (2); see also the case of *Bleakley* v. *Smith.* (3) In the present case it is impossible to doubt that the word "your," twice used in the written document, refers to the defendants, whose name and address is given in full at the head of the document. Nor can I doubt that both Harding and the defendants intended that this document, when signed by Evans, should be the final memorandum of the contract binding upon the defendants as well as the plaintiff. Mr. Witt contended that the cases relied upon were all cases where the document was sent out by the person charged. I do not think that this is necessary, if by the expression "sent out" is meant more than submitted for signature to the other party. If the party sued has authorized an agent to lay before the party suing a document *containing his name in full* as that of the party with whom the contract is to be made, so as to announce to the other party that they are offering him certain terms if he will agree to them in writing, and he thereupon signs, I think that there is a sufficient "agreement or memorandum thereof, signed by a party authorized thereunto" within

(1) 2 M. & S. 286. (2) 2 Q. B. D. 314.

(3) 11 Sim. 150.

s. 4 of the Statute of Frauds. That appears to me to be the case here. I therefore think that the plaintiff is entitled to judgment for the amount of the verdict.

CAVE, J. I am of the same opinion. The case put forward on behalf of the plaintiff was based on the grounds which have been stated by my brother Denman; and it was further contended that the plaintiff had served, and must, therefore, be entitled to recover something in respect of such service. It is obvious, however, that this latter contention is not well founded; for the plaintiff had not completed any one month of service under the contract. The real point to be decided is, whether the document in question is a memorandum or note in writing of an agreement signed by the party to be charged, or by some other person lawfully authorized, within the meaning of s. 4 of the Statute of Frauds (29 Car. 2, c. 3). The Statute of Frauds was passed at a period when the legislature was somewhat inclined to provide that cases should be decided according to fixed rules, rather than to leave it to the jury to consider the effect of the evidence in each case. This, no doubt, arose to a certain extent from the fact that in those days the plaintiff and the defendant were not competent witnesses. Several cases were referred to in the course of the argument, which it was contended could not be distinguished from the present case; but it is difficult to ascertain whether the circumstances of the different cases are the same, or rather whether the circumstances in which the different cases are similar or dissimilar are material or immaterial to the point under consideration. No doubt, in attempting to frame a principle, one is obliged to depart somewhat from the strict lines of the statute. I am of opinion that the principle to be derived from the decisions is this. In the first place, there must be a memorandum of a contract, not merely a memorandum of a proposal; and, secondly, there must be in the memorandum, somewhere or other, the name of the party to be charged, signed by him or by his authorized agent. Whether the name occurs in the body of the memorandum, or at the beginning, or at the end, if it is intended for a signature there is a memorandum of the agreement within the meaning of the statute. In the present case it is true

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that the name of the defendants occurs in the agreement; but it is suggested on behalf of the defendants that it was only put in to shew who the persons were to whom the letter was addressed. The answer is that there is the name, and it was inserted by the defendants' agent in a contract which was undoubtedly intended by the defendants to be binding on the plaintiff; and, therefore, the fact that it is only in the form of an address is immaterial. A case was referred to in the argument, *Schneider* v. *Norris* (1), in which a printed bill-head was held to amount to a signature within the meaning of the statute. That is a stronger case than the present. The printed heading there was not put into the document for the purpose of constituting a memorandum of the contract; but it was so used with the assent of the party sought to be charged, and it therefore was held to have the effect of a signature. This shews that it is unimportant how the name came to be inserted in the document. I cannot discover any other principle than that which I have stated, and I am of opinion that the present case comes within that principle; and therefore the plaintiff is entitled to judgment for the amount of the damages found by the jury.

Appeal allowed.

Leave to appeal refused.

Solicitors for plaintiff: *Aird & Hood.*

Solicitors for defendants: *Courtenay, Croome, Son, & Finch.*

(1) 2 M. & S. 286.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.

1892

March 3.

THE IMPERIAL LOAN COMPANY, LIMITED *v.* STONE.

Lunatic—Capacity to Contract—Knowledge of the other Contracting Party—Averment of Knowledge—Onus of Proof.

Where a defendant in an action of contract sets up the defence that he was insane when the contract was made, he must, in order to succeed in this defence, shew that at the time of the contract his insanity was known to the plaintiff.

APPLICATION for a new trial.

The action was brought on a promissory note which the defendant, who had since the making of the note been found by inquisition to be a lunatic, signed as surety. The statement of defence alleged that the defendant when he signed the note was so insane as to be incapable of understanding what he was doing, and this allegation was repeated with the further allegation added that the insanity of the defendant was known to the plaintiffs.

The case was tried before Denman, J., who left to the jury the questions whether the defendant, when he signed the note, was so insane as not to be capable of understanding what he did, and whether this incapacity was known to the agent of the plaintiffs who was present when the note was signed. The jury found that the defendant was insane when he signed the note; but they could not agree upon the question as to the knowledge of the plaintiffs' agent. The learned judge entered a verdict for the defendant. The plaintiffs applied for judgment or for a new trial.

Channell, Q.C., and *Le Riche*, in support of the application. The entry of judgment for the defendant must be wrong, for the issue whether the plaintiffs knew of the incapacity of the defendant to contract was one that could not have been withdrawn from the jury. It was always necessary to aver such knowledge: *Lovatt* v. *Tribe* (1); and it must be proved by the defendant in order that he may succeed: *Harrison* v. *Richardson* (2); *Molton* v. *Camroux* (3); *Beavan* v. *M'Donnell.* (4)

(1) 3 F. & F. 9.
(2) 1 Mood. & Rob. 504.
(3) 2 Ex. 487; 4 Ex. 17.
(4) 9 Ex. 309.

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Witt, Q.C., and *G. A. Scott*, for the defendant. There is no authority that a man can be sued and made liable on an executory contract which he was incapable of understanding by reason of insanity. There are cases in which a contract for necessaries has been enforced; but there is an implied contract to pay in such cases arising from the circumstances: *Gore* v. *Gibson* (1); and where the position of the parties has been altered the Court of Equity will not interfere: *Niell* v. *Morley.* (2) There is a distinction between executed and executory contracts, between getting back money that has been paid and avoiding liability to pay it: *Valentini* v. *Canali.* (3) If the mind does not go with the act, that is sufficient to release the defendant from liability on a contract, whatever be the cause of the incapacity: *Foster* v. *Mackinnon* (4); *Jenkins* v. *Morris.* (5)

In *Drew* v. *Nunn* (6), Bramwell, B., says: "If a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting;" so that when total incapacity is proved, there is no contract on which to proceed. The contract of suretyship is one which "should be based upon the free and voluntary agency of the individual who enters into it": *Williams* v. *Bayley* (7), and *Davies* v. *London and Provincial Marine Insurance Co.* (8) It cannot be said that the act of an insane person in making such a contract could be so described.

LORD ESHER, M.R. In this case judgment has been entered for the defendant on the findings of the jury, although the jury have not agreed on one of the questions left to them. If we are of opinion that the entry of judgment is wrong, no other course is open to us but to direct a new trial.

The action is on a promissory note signed by the defendant as surety, and his answer is that he was so insane at the time he signed the note that he was not capable of understanding the transaction, and the jury have found that this was so. The defence added another matter, namely, that the plaintiffs knew of the defendant's state, and on that point the jury have been

(1) 13 M. & W. 623.
(2) 9 Ves. 478.
(3) 24 Q. B. D. 166.
(4) Law Rep. 4 C. P. 704.
(5) 14 Ch. D. 674.
(6) 4 Q. B. D. 661, at p. 669.
(7) Law Rep. 1 H. L. 200, at p. 219.
(8) 8 Ch. D. 469, at p. 475.

unable to agree. This raises the questions whether that allegation is a necessary part of the plea, and if so on whom the burden of proving it lies.

I shall not try to go through the cases bearing on the subject; but what I am about to state appears to me to be the result of all the cases. When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

It can hardly be doubted that for a long series of years, if insanity was set up in answer to an action for breach of contract, it must have been pleaded, and the plea was not good unless it went on to allege knowledge on the part of the plaintiff. The fact of such a plea being required, and having to go to that extent, shews that the law as I have stated it was generally accepted. The burden of proof, in such a case, must lie on the defendant; the jury have disagreed on a material question in the cause, and as there is no finding on that question the case must go back for a new trial.

FRY, L.J. I also disagree with the conclusion of the learned judge. The law relating to this matter I take to be of very old date, and much light is thrown upon it by Littleton in his treatise on Tenures. That learned author, in treating of descents, laid down (Litt. s. 405) that "no man of full age shall be received in any plea by the law to stultify and disable his own person"; but he went on to point out that the heir can avoid a deed made by a person non compos mentis, though the person himself could not. The subject came before the Court of King's Bench in *Beverley's Case* (1), where the Court laid down, "that every deed, feoffment, or grant, which any man non compos mentis makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea

(1) 4 Co. Rep. 123 b.

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to be pleaded by him, received by the law to stultify himself," and reference was made to Littleton's Tenures. Before that date Fitzherbert (F. N. Br. 202 D.) took a different view; but his view was overruled by *Stroud* v. *Marshal.* (1) Then came Coke, who adopted the view of Littleton (Co. Litt. 247 *b*), who, he said, was of opinion "that neither by plea nor by writ nor otherwise, he himselfe shall avoid it, but his heire (in respect his ancestor was non compos mentis) shall avoid it by entrie, plea, or writ. And herewith the greatest authorities of our bookes agree; and so it was resolved with Littleton in *Beverley's Case* (2), where it is said, that it is a maxim of the common law, that the partie shall not disable himselfe." Therefore, although in certain cases the Crown, and in other cases persons who claimed under one who was non compos mentis, could set up the disability, the man himself could not. In *Molton* v. *Camroux* (3), which was affirmed in the Exchequer Chamber (4), Pollock, C.B., in delivering the judgment of the Court, said the rule had in modern times been relaxed, and unsoundness of mind would now be a good defence to an action upon a contract, if it could be shewn that the defendant was not of capacity to contract, "and the plaintiff knew it," and for this he referred to *Browne* v. *Joddrell* (5); *Baxter* v. *Earl of Portsmouth* (6); and *Dane* v. *Viscountess Kirkwall.* (7) It thus appears that there has been grafted on the old rule the exception that the contracts of a person who is non compos mentis may be avoided when his condition can be shewn to have been known to the plaintiff. So far as I know, that is the only exception. The question whether that knowledge exists has not been determined in this case, and consequently we cannot say that the exception applies, and judgment could not properly be entered for the defendant. There must, therefore, be a new trial.

LOPES, L.J. It seems to me that the principle to be deduced from the cases may be summarised thus: A contract made by a person of unsound mind is not voidable at that person's option

(1) Cro. Eliz. 398.
(2) 4 Co. Rep. 123 b.
(3) 2 Ex. 487.
(4) 4 Ex. 17.
(5) 1 Mood. & M. 105.
(6) 5 B. & C. 170.
(7) 8 C. & P. 679.

if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed. Applying that in the present case, it is apparent that the verdict entered for the defendant cannot stand, but that there must be a new trial.

Order for new trial.

Solicitor for plaintiffs: *Charles Thomas Foster.*
Solicitor for defendant: *T. H. Hiscott.*

A. M.

POLE *v.* BRIGHT.

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Nov. 17, 18.

Practice—County Court—Refusal of County Court Judge to grant New Trial—Appeal to High Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

An appeal to the High Court lies under s. 120 of the County Courts Act, 1888, against the refusal of a county court judge to grant an application for a new trial of an action, on the ground that his decision was wrong in point of law.

APPEAL from the judge of the Axminster County Court refusing an application by the defendant for a new trial.

The trial was on July 6, 1891, and no notice of motion by way of appeal was served or appeal entered within twenty-one days, as required by Order LIX. r. 12. Subsequently the defendant gave notice of his intention to apply to the judge for a new trial; and on August 15 the application was made and refused. From this refusal the defendant appealed on the ground that the decision was wrong in law.

Lumley Smith, Q.C. (*Hon. B. Coleridge,* with him), for the plaintiff. There is a preliminary objection to the hearing of this appeal. No appeal will lie under s. 120 of the County Courts Act, 1888, from the refusal of a county court judge to

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grant a new trial. That was the clear opinion of the Court in *How* v. *London and North Western Ry. Co.* (1), and the reason there given, that to allow such an appeal would be in effect indirectly to extend the time for appealing from the original determination or direction of the judge, is conclusive. It is true that such an appeal was allowed in *Dingor* v. *Matthews* (2); but that case cannot be considered as an authority after the strong opinion expressed in *How* v. *London and North Western Ry. Co.* (1)

R. M. Bray, (*T. W. Chitty*, with him), for the defendant. An appeal lies from the refusal of a county court judge to grant a new trial, wholly irrespective of the fact that the time for appealing against his original decision or judgment in the action may have expired. *Dingor* v. *Matthews* (2) is an express authority, and the opinion of the Court in *How* v. *London and North Western Ry. Co.* (1) was founded on the impression that *Dingor* v. *Matthews* (2) was an appeal from an order of a county court judge granting a new trial, whereas it was in fact an appeal from a refusal to grant one.

Apart from authority, there would seem to be no reason for making a distinction between the granting and refusing a new trial so as to affect the right of appeal; both cases fall equally within the provisions of s. 120 of the County Courts Act, 1888. That section, which provides for appeals both in matters of law and equity, is very similar in its language to 28 & 29 Vict. c. 99, s. 18, which gave a right of appeal from the decision of a county court judge sitting in equity, and under which it was held that an appeal lay in interlocutory matters on the equity side: *Jonas* v. *Long*. (3)

[He also cited *Carr* v. *Stringer* (4); *Jacobs* v. *Dawkes*. (5)]

Lumley Smith, Q.C., in reply.

MATHEW, J. I am of opinion that this preliminary objection must be overruled. I adhere to the decision of the Lord Chief Justice and myself in *Dingor* v. *Matthews*. (2) In that case the same point was raised, and we intended to indicate that in coming to our decision we were guided by the altered language

(1) [1891] 2 Q. B. 496.
(2) 88 L. T. Journ. 139.
(3) 20 Q. B. D. 564.
(4) E. B. & E. 123.
(5) 56 L. J. (Q.B.) 446.

of the Act of 1888 as to appeals. If we look at s. 14 of the Act of 1850 (which applied to appeals on the common law side), it is apparent that the language there used was much less wide, and that under that section no appeal would lie in interlocutory matters. This was, indeed, the interpretation put upon the section in *Carr* v. *Stringer* (1), which decision was followed in *Jacobs* v. *Dawkes*. (2) By 28 & 29 Vict. c. 99, which is the statute dealing with the equitable jurisdiction of county courts, provision was made in s. 18 for appeals in language essentially different from that used in the prior statute, and that section was the subject of judicial interpretation by the Court of Appeal in *Jonas* v. *Long* (3), where it was decided that an appeal in interlocutory matters lay on the equity side of the county court.

That was the state of the law before the passing of the Act of 1888, by which these two sections were blended into one, and words were introduced which, in my judgment, it is impossible to interpret otherwise than as they were interpreted in *Dingor* v. *Matthews*. (4) The rules relating to appeals have been so framed as to correspond with the section, and they deal with appeals other than appeals against final judgments. There seems to me no difficulty in holding that an appeal lies from a refusal to grant a new trial. A distinction was drawn in *How* v. *London and North Western Ry. Co.* (5), where it was decided that an appeal lay from the decision of a county court judge granting a new trial, but doubted whether one lay from his refusal. That distinction appears to me, however, to be somewhat technical, and is, I think, not a satisfactory one. There is no question that the litigant can in a proper case appeal to the High Court within twenty-one days, and can also apply in the county court for a new trial; and if his appeal to the High Court could be heard within the twenty-one days, there might be force in the suggestion that to allow an appeal from a refusal to grant a new trial would be to extend indirectly the time for appealing in the action; but as a matter of fact, county court appeals are not heard within the twenty-one days, and there seems no sufficient

(1) E. B. & E. 123.
(2) 56 L. J. (Q.B.) 446.
(3) 20 Q. B. D. 564.
(4) 88 L. T. Journ. 139.
(5) [1891] 2 Q. B. 496.

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reason why a litigant should not be allowed to fall back on his appeal to the High Court if his application for a new trial is refused. I am unable, therefore, to see any reason for making a distinction between the cases of granting and refusing a new trial, both of which seem to be clearly within the language of the section.

A. L. SMITH, J. I agree that this appeal ought to be heard, and I consider myself bound by authority. By 13 & 14 Vict. c. 61, s. 14, no right of appeal was given from interlocutory orders on the common law side of the county court; but in 1865 an appeal was given in interlocutory matters on the equity side. This was the decision of the Court of Appeal in *Jonas* v. *Long*. (1) Then comes the Act of 1888, which is a consolidation Act, s. 120 being practically, if not identically, the same as the section in the Act of 1865. In that state of the law the case of *Dingor* v. *Matthews* (2) came before the Lord Chief Justice and my brother Mathew, who held that there was an appeal from a refusal of a county court judge to grant a new trial, and if the matter rested there we should be bound by that authority. But it is said that in *How* v. *London and North Western Ry. Co.* (3) my brothers Cave and Charles came to a different decision. It was, however, not competent for them to give a decision contrary to that in *Dingor* v. *Matthews* (2); and though there are in their judgment indications of an opinion that there is no right of appeal from a refusal of a county court judge to grant a new trial, such opinion must be treated as an obiter dictum, and not as a judicial decision. The opinion seems, in fact, to have arisen from the supposition that *Dingor* v. *Matthews* (2) was an appeal from the granting of a new trial, whereas it was, in fact, an appeal from a refusal of one. We are, therefore, not bound by that expression of opinion, and are properly fettered by the decision in *Dingor* v. *Matthews* (2).

Objection overruled.

The case was then heard on the merits.

Solicitors for plaintiff: *Tweed & Stikeman, for Tweed, Honiton.*
Solicitors for defendant: *Torr & Co., for Every, Honiton.*

(1) 20 Q. B. D. 564. (2) 88 L. T. Journ. 139.
(3) [1891] 2 Q. B. 496.

W. J. B.

PALMER *v.* CALEDONIAN RAILWAY COMPANY.

1892
March 10.

Practice—Writ of Summons—Service—Railway Company—Scotch Railway Company having part of its Line in England—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 138—*Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *s.* 135—*Order* IX., *r.* 8.

By s. 138 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), "Any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the company, may be served by the same being left at or transmitted through the post directed to the principal office of the company, or one of their principal offices, when there shall be more than one, or being given personally to the secretary, or, in case there be no secretary, then by being given to any one director of the company."

A Scotch railway company, the head office of which was in Scotland, had a short part of its line in England. The Railways Clauses Act was incorporated with the special Act of the company so far as related to the English part of the line:—

Held, that service of a writ at the most important office of the company on the English part of its line was good service within the meaning of the section.

MOTION to set aside the writ, which had been served at the office of the defendant company at Carlisle, on the ground that such service was irregular. It appeared that the company was domiciled in Scotland, that the whole line, except a distance of six miles between the border and Carlisle, was in Scotland, and that the head office was in Scotland; but that the office at Carlisle was the most important office of the company in England. The Railways Clauses Act (1) and the Companies Clauses Act (1) were incorporated with the company's special Act in so far as related to the English part of the line.

(1) By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 138, and the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 135: "Any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the company, may be served by the same being left at or transmitted through the post directed to the principal office of the company, or one of their principal offices when there shall be more than one, or being given personally to the secretary, or, in case there be no secretary, then by being given to any one director of the company."

By Order IX., r. 8: "In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer or on the town clerk, clerk, treasurer, or secretary of such corporation; . . . and where by any statute provision is made for

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E. Page, for the defendants. The service was irregular. According to *Wilson* v. *Caledonian Ry. Co.* (1), the company can be sued in the English Courts, and service on the secretary if he could have been found in England would have been good. But the office at Carlisle is not "the principal or one of the principal offices" of the company. Their head office in Scotland is their only "principal" office within the meaning of s. 138 of the Railways Clauses Act, according to the judgment delivered by Lord Campbell, C.J., in *Garton* v. *Great Western Ry. Co.* (2)

Joseph Walton, for the plaintiff. The service was good. The judgments in *Wilson* v. *Caledonian Ry. Co.* (1) shew that the company is, in so far as relates to the English part of its line, to be treated as an English company. If this is so, the office at Carlisle is the "principal" office of the English company.

COLLINS, J. The case seems to me very simple. The question is whether the service at Carlisle was good under s. 138 of the Railways Clauses Act, which refers only to the six miles of the defendant company's line which is in England, and enacts that a writ may be served at "the principal office of the company or one of their principal offices." We have the authority of Parke, B., in *Wilson* v. *Caledonian Ry. Co.* (1), for treating the company as at once Scotch and English. He says: "I do not see how it is possible to say that this is not an English corporation for some purposes." I think that the plaintiff is entitled to treat the company as an English company, and its office at Carlisle as, if not "the principal," "one of the principal offices" of such company. The service was therefore good.

CAVE, J., concurred.

Motion dismissed.

Solicitors for plaintiff: *Wood & Wootton, for Sewell, Carlisle.*
Solicitors for defendants: *Currey & Hawkins.*

service of any writ of summons, bill, petition, summons, or other process, upon any corporation, or upon any society or fellowship, or any body or number of persons, whether corporate or unincorporate, every writ of summons may be served in the manner so provided."

(1) 5 Ex. 822; 20 L. J. (Ex.) 6.

(2) E. B. & E. 837; 27 L. J. (Q.B.) 375.

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.
1892
April 4.

IN THE MATTER OF THE HOUSING OF THE WORKING CLASSES ACT, 1890. EX PARTE STEVENSON AND OTHERS.

Practice—Appeal—Housing of the Working Classes Act, 1890 (53 & 54 *Vict.* c. 70), *Sched. II., Clause* 26 (*a*)—*Party dissatisfied with Award of Arbitrator—Refusal of Leave to Appeal.*

By Sched. II., clause 26 (*a*), of the Housing of the Working Classes Act, 1890, it is provided that in the cases therein specified the party dissatisfied with the amount of the compensation ascertained by any award under Part I. of the Act, "may, upon obtaining the leave of the High Court, which leave may be granted by such Court, or any judge thereof at chambers, in a summary manner, and upon being satisfied that a failure of justice will take place if the leave is not granted, submit the question of the proper amount of compensation to a jury." A judge at chambers having refused to grant the leave above mentioned, the Divisional Court held that no appeal lay to them from his decision. On appeal from their decision to the Court of Appeal:—

Held, that no appeal lay.

APPEAL from the decision of the Queen's Bench Division (Lord Coleridge, C.J., and Cave, J.). (1)

The facts were as follows: The corporation of Manchester, as the local authority of Manchester, took compulsorily under the powers vested in them by the Housing of the Working Classes Act, 1890, for the purposes of an improvement scheme under that Act, certain land of the claimant. In an arbitration under the Act for the assessment of the compensation payable to the claimant in respect of the land so taken, the arbitrator awarded a sum of 3841*l.* The claimant, being dissatisfied with that amount, applied to a judge at chambers for leave to submit the amount of compensation to a jury under clause 26 of Sched. II. of the Act, but the application was refused. The claimant appealed to the Divisional Court; but they held that there was no appeal. The claimant appealed.

Ambrose, Q.C., and *W. H. Stevenson*, (*Channell, Q.C.*, with them), for the claimant. An appeal lay to the Queen's Bench Division, and there is an appeal from the Queen's Bench Division to this Court. There is a general power given by the Judicature Act

(1) Ante, p. 394.

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to appeal from orders made at chambers to the High Court, and to appeal from orders of the High Court to the Court of Appeal: see Judicature Act, 1873, ss. 19, 50. It is contended that the meaning of the provision of the Housing of the Working Classes Act with regard to leave to submit the matter to a jury by way of appeal from an arbitrator is that the question whether such leave shall be given shall be decided by the judge at chambers, as the representative of the Court, or by the Court itself, in the ordinary way, and with the same consequences as in the case of any other order made by a judge or the Court. There is no provision in this Act that the decision of the judge at chambers or the Court shall be final. So the case is not within the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 20.

[LOPES, L.J., referred to *Lane* v. *Esdaile*. (1)]

There the granting of leave was mere matter of discretion and indulgence.

[The Court intimated that they were of opinion that the appeal did not lie; and, therefore, the counsel for the claimant did not argue on the merits.]

Moulton, Q.C., and *Pankhurst*, for the corporation, were not called upon.

LORD ESHER, M.R. It seems to me that the proceeding for which the leave of the High Court is rendered necessary under the 26th clause of Sched. II. of the Act is clearly an appeal. The part of the schedule in which that clause is contained is headed with the word "Appeal." The clause says that "the party dissatisfied may, upon obtaining the leave of the High Court, which leave may be granted by such Court, or a judge thereof at chambers, in a summary manner, and upon being satisfied that a failure of justice will take place if such leave is not granted, submit the question of the proper amount of compensation to a jury, provided that such party give notice in writing to the other party of their intention to appeal within ten days after the cause of appeal has arisen." It is clear that, in effect, the provision is that the party dissatisfied may apply for the leave of the High Court to appeal from the decision of the

(1) [1891] A. C. 210.

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Lord Esher, M.R.

arbitrator to a jury. The High Court may grant such leave, either sitting as a Divisional Court, or through a judge thereof sitting at chambers, on being satisfied that justice requires it. If anything further were needed to shew that the proceeding is an appeal, it is to be found in the subsequent provisions of the schedule as to costs, which distinctly speak of it as such. I am, on principle and on consideration of the authorities that have been cited, prepared to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. So, if the decision in this case is to be taken to be that of the judge at chambers, he is the legal authority to decide the matter, and his decision is final; if it is to be taken to be that of the High Court, then they are the legal authority entrusted with the responsibility of deciding whether there shall be leave to appeal, and their decision is final. In either case there is no appeal to this Court. What was said in the case of *Lane* v. *Esdaile* (1) supports the view that I am taking. But the very nature of the thing really concludes the question; for, if, where a legal authority has power to decide whether leave to appeal shall be given or refused, there can be an appeal from that decision, the result is an absurdity, and the provision is made of no effect. If the contention for the claimant be correct, it would follow that the case might be taken from one Court to another till it reached the House of Lords on the question whether there should be leave to appeal. That cannot be so. For these reasons, I think the appeal must be dismissed.

FRY, L.J. The Judicature Act has given a general right of appeal to this Court from judgments and orders of the High Court or any judge or judges thereof. The question is whether that provision applies to a refusal of leave to submit the question of compensation to a jury under this Act. The object of the Act is to make provision for the taking of land for certain purposes and for compensation to the persons whose land is

(1) [1891] A. C. 210.

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FRY, L.J.

taken to be assessed by an arbitrator, and it gives in certain cases an appeal from his award to a jury. I say an "appeal" because the proceeding is in substance an appeal, and the legislature has called it so in the Act. The legislature has thought fit to impose a condition in respect of this right of appeal, viz., that the leave of the High Court must be obtained, which leave is to be granted in the manner pointed out, viz., either by the Divisional Court or by a judge at chambers. Then is the order —for such I will assume it to be—of the High Court, granting or refusing leave to appeal, subject to appeal? In my opinion it is not. I do not come to that conclusion on the ground that the word "order" is not properly applicable to it; but from the nature of the thing and the object of the legislature in imposing this fetter on appeals. The object clearly was to prevent frivolous and needless appeals. If, from an order refusing leave to appeal, there may be an appeal, the result will be that, in attempting to prevent needless and frivolous appeals, the legislature will have introduced a new series of appeals with regard to the leave to appeal. Suppose, for the sake of argument, that in this case the claimant's grounds for wishing to appeal are frivolous; if the contention on his behalf is correct, he could appeal from the judge at chambers to the Divisional Court, from the Divisional Court to this Court, and from this Court to the House of Lords on the question whether he shall be allowed to appeal. It appears to me that that would be an absurd result in the case of a provision the object of which is to prevent frivolous and needless appeals. Therefore, from the very nature of the thing the decision of the Court which has the power of giving leave to appeal is, in my opinion, final. This seems to me to be the ratio decidendi of *Lane* v. *Esdaile*. (1) That case appears to decide that, where the right to appeal depends upon the granting or refusal of leave to appeal by a Court, that granting or refusal of leave must be final.

LOPES, L.J. Where an appeal is given that is made subject to the leave of the Court or a judge, or any other legal authority, I think that the granting or refusal of leave by such Court,

(1) [1891] A. C. 210.

or judge, or other legal authority, is final and unappealable. The object of making appeals subject to leave is to prevent unnecessary and frivolous appeals. If an appeal were allowed from the granting or refusal of leave to appeal, the result would be that, instead of checking appeals, they might be multiplied to a most mischievous extent; for an appeal from the granting or refusal of leave might be carried from the Divisional Court to this Court, and from this Court to the House of Lords. For these reasons I think that the preliminary objection must prevail. A distinction was taken by the counsel for the claimant between this case and cases where it is expressly provided that the decision shall be final. This point was fully dealt with by Lord Herschell in *Lane* v. *Esdaile*. (1) He there referred to the suggested distinction between a case where it is said that no appeal shall lie after a year except by special leave, and a case where it is said that the determination of the appeal shall be final unless special leave to appeal be given, and said, "I do not think that there is any difference in the meaning of those two expressions. What interpretation are you to put upon the expression 'shall be final'? None but this in that context, that the determination of the appeal by the Divisional Court shall not be made a subject of appeal unless special leave be given. What difference is there between that and saying that no appeal shall lie unless special leave be given?" For these reasons, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for claimant: *Stuart & Tull, for T. E. Jones, Manchester.*

Solicitors for the Corporation of Manchester: *Austin & Austin, for Town Clerk, Manchester.*

(1) [1891] A. C. 210, at p. 215.

E. L.

1892
March 14.

MADDEN *v.* THE KENSINGTON VESTRY.

Metropolis—Management Acts—Vestry—Notice of Action—Sufficiency of Notice—Statement of Cause of Action—Statement of Place where Injury occurred—25 & 26 Vict. c. 102, s. 106.

A notice of an action against a vestry for something done, or intended to be done, under the powers of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), sufficiently states the cause of action within the meaning of s. 106 of that Act, although it contains an inaccurate statement as to the place where the injury complained of occurred, provided such inaccurate statement is not calculated to mislead the defendants.

Martins v. *Upcher* (3 Q. B. 662) distinguished.

APPEAL by the plaintiff from the decision of the judge of the Brompton County Court.

The action was brought to recover damages for injury caused by the plaintiff's horse having stepped upon a grid or grating over a sewer, which, it was alleged, the defendants had allowed to remain in a dangerous, broken, and unsafe state.

The only question raised by the appeal was as to the sufficiency of the notice of action (1), which described the grid as situated in Silver Street, whereas it was shewn at the trial that the grid was in fact situated in the Uxbridge Road, opposite Silver Street, about twenty feet from the end of that street, where it joins the Uxbridge Road.

The county court judge was of opinion that, as the position of the grid was incorrectly stated, the notice of action did not state the cause of action within the meaning of the statute, and was therefore insufficient, and he nonsuited the plaintiff.

W. E. Hume Williams, for the plaintiff, in support of the appeal. The nonsuit was wrong. The notice of action suffi-

(1) By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 106, before an action is commenced against a vestry for anything done, or intended to be done, under the powers of that Act, a month's notice in writing must be served upon the vestry, "stating the cause of action or grounds of the proceeding or demand . . . and upon the trial of any action the plaintiff shall not be permitted to go into evidence of any cause of action except such as is stated in the notice so served or delivered."

ciently states the cause of action within the meaning of the statute. The inaccuracy in the statement of the position of the grid could not by any possibility have misled the defendants, and therefore cannot vitiate the notice of action: *Jones* v. *Bird* (1); *Smith* v. *West Derby Local Board.* (2)

Lumley Smith, Q.C. (*Courthope-Munroe,* with him), for the defendants. The case of *Martins* v. *Upcher* (3) distinctly decides that a statement of time and place in a notice of action is material and necessary. Here, it is true, a place is stated; but it is the wrong place, which has the same effect as if the statement of the place were altogether omitted. It follows that the notice of action is insufficient.

[The following authorities were also referred to: *Breese* v. *Jerdein* (4); *Jones* v. *Nicholls* (5); *Jacklin* v. *Fytche* (6); *Leary* v. *Patrick* (7); *Forbes* v. *Lloyd.* (8)]

DENMAN, J. The utmost extent to which the decision in *Martins* v. *Upcher* (3) goes is to shew that a place must be stated in the notice of action. I think that case is correctly distinguished by Rolfe, B., in *Jacklin* v. *Fytche* (9), where he says: "If the case of *Martins* v. *Upcher* (3) be admitted to be good law, it does not necessarily follow that the first part of this notice is bad; because there no place was mentioned; it was left in this respect in perfect ambiguity." I follow *Martins* v. *Upcher* (3) in holding that a place must be mentioned in the notice of action; but where, as here, the notice does not, and cannot, mislead the defendants, the case is not one for a nonsuit. In the present case, it was shewn that the grid was within twenty feet of the end of Silver Street—the street in which the notice of action stated that it was situated. Therefore, while not contesting the authority of *Martins* v. *Upcher* (3), I am of opinion that that case does not decide that in such a case as the present the cause of action is not sufficiently described in the notice of action, so as to give notice to the vestry of what is complained of. The notice of

(1) 5 B. & A. 837.
(2) 3 C. P. D. 423.
(3) 3 Q. B. 662.
(4) 4 Q. B. 585.
(5) 13 M. & W. 361.
(6) 14 M. & W. 381.
(7) 15 Q. B. 266.
(8) Ir. Rep. 10 C. L. 552.
(9) 14 M. & W. 381, at p. 387.

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action is not in any way calculated to mislead the defendants, and, therefore, the nonsuit must be set aside.

CAVE, J. I entirely agree.

Appeal allowed; leave to appeal refused.

Solicitors for plaintiff: *Morris & Rickards.*
Solicitors for defendants: *Pontifex, Hewitt, & Fox.*

P. B. H.

1892
March 5, 19.

GORDON *v.* WILLIAMSON.

Metropolis—Local Management—Vestryman — Qualification —Rating—Occupation—18 & 19 *Vict. c.* 120, *s.* 6; 19 & 20 *Vict. c.* 112, *s.* 8.

By s. 6 of the Metropolis Local Management Act, 1855 (as amended by 19 & 20 Vict. c. 112, s. 8), a person claiming a qualification as a vestryman must occupy premises in the parish of a rateable value of not less than 40*l.*

The defendant was tenant of premises which appeared in the rate-book as of a rateable value of 125*l.* He sublet a portion of such premises, and occupied the remainder. The portion which he retained in his own occupation was, in fact, of a rateable value of not less than 40*l.*, but was not separately assessed in the rate-book. The defendant occupied no other premises in the parish:—

Held, by Denman, J., that he was not qualified to be elected as a vestryman under the above Act.

FURTHER consideration by Denman, J.

The defendant was, in May, 1890, elected a member of the vestry for the parish of St. Mary, Islington, which is one of the parishes mentioned in Schedule A of the Metropolis Local Management Act, 1855. He was at that time tenant of certain premises in the parish known as 57A, Ashburton Grove, consisting of a yard, stables, and workshop. These premises were rated as one tenement, and appeared in the rateable value column of the rate-book as of the value of 125*l.* The defendant was rated as the occupier of such tenement. He did not, however, in fact, occupy the whole of the premises, having sublet a portion of them. He occupied no other premises in the parish. Having been elected, he attended the vestry meetings and voted as a vestryman on five different occasions.

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The plaintiff sued as a common informer under s. 54 (1) of the Metropolis Local Management Act, 1855, to recover from the defendant five penalties of 50*l.* each, for having on the said five occasions acted as a vestryman without being qualified by occupation as required by the Act.

At the trial, which took place before Denman, J., and a jury, the jury found that the portion of the premises, 57A, Ashburton Grove, which the defendant retained in his own occupation, were of a rateable value of more than 40*l.* The judge reserved for further consideration the question whether, upon the above facts, the defendant was sufficiently qualified.

J. E. Bankes, (*Lewis Thomas*, with him), for the plaintiff. To be qualified as a vestryman under the Act, a person must both be rated in respect of and occupy premises of a rateable value of not less than 40*l.* But here there is no evidence of the rateable value of the portion occupied by the defendant; for it was

(1) By s. 6 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120): "The vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than forty pounds per annum, and no person shall be capable of acting or being elected as one of such vestry for any parish unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish."

By s. 54 of the same Act: "Any person who acts as a member of any such vestry as aforesaid, without being qualified by rating and occupation as required by this Act, shall for every such offence be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same in any of the Superior Courts of Law."

By s. 8 of the 19 & 20 Vict. c. 112, (which by s. 12 is to be construed together with the Act of 18 & 19 Vict. c. 120, as one Act), it is provided that: "Whereas, by the Act of 6 & 7 Wm. 4, c. 96 . . . it is required that every rate for the relief of the poor shall . . . contain an account of every particular set forth at the head of the respective columns in the form given in the schedule to that Act annexed, so far as the same can be ascertained, and in the form in the said schedule are two columns headed respectively 'Gross estimated Rental' and 'Rateable Value'; and whereas, by the said Act of the last session, it is required that in order to qualify a person to be elected a vestryman . . . he should be rated to the relief of the poor upon a rental of such amount as therein mentioned; and whereas doubts are entertained which of the amounts specified in the said two columns is to be deemed the 'rental' for the purpose of the last-mentioned Act, the amount specified in the said column headed 'Rateable Value,' shall be deemed the 'rental' for the purposes of the last-mentioned Act."

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not separately assessed in the rate-book, and the rate-book is the only evidence of rateable value, the assessment committee being the only persons who have authority to assess the value. The intention of the Act was, that any one on looking at the rate-book might see at once whether a vestryman was qualified or not. In *Mogg* v. *Clark* (1), Lopes, J., said: "I think the true construction of s. 6 is that no person is to be qualified as a vestryman unless he is an occupier of real property in the parish, and is rated or assessed in respect of such occupation." That is to say, the area of occupation must be coextensive with that of rating. And in *Reg.* v. *Soutter* (2) the Court of Appeal took the same view, and decided that the vestryman must occupy the very premises in respect of which he is rated. But that the defendant did not do here.

Channell, Q.C. (*Wedderburn*, with him), for the defendant. All that the Act requires is that the person should occupy the premises, and be rated in respect of them to the required amount. That was the case with the defendant. It is true he was in fact liable to pay more rates than would have been sufficient to qualify him; but that ought not to take away his qualification. The rate-book is not the only evidence of the rateable value of the portion occupied by the defendant. Under the Waterworks Acts the water-rates were based upon the annual value of the house, which was held to mean the same thing as the rateable value. But the rate-book was never regarded as the only evidence of such annual or rateable value.

Cur. adv. vult.

March 19. DENMAN, J., read the following judgment:—

This was an action for penalties for voting as a vestryman without being duly qualified.

The defendant's name appeared in the rate-book in the column headed "Rateable Value" as rated at 125*l.* in respect of premises described as "57A, Ashburton Grove—yard, stables, and workshop." He did not occupy the whole of the premises so described, but a portion only of them, which portion the jury found to be of a rateable value of more than 40*l.* He voted as a

(1) 15 Q. B. D. 82. (2) [1891] 1 Q. B. 57.

vestryman on five occasions; and the question is whether 250*l.* for penalties are recoverable notwithstanding the finding of the jury. I think they are. In the case of *Mogg* v. *Clark* (1), it was held that there must be both rating of and occupation by the party to the required amount to entitle him to be elected as a vestryman, and that the qualification was not acquired where either requirement was lacking. Then comes the case of *Reg.* v. *Soutter* (2). In that case it was held that where the vestryman either was rated in respect of premises of less rateable value than 40*l.*, or did not occupy premises of that value, he was not qualified.

The point raised in the present case was not decided either in *Mogg* v. *Clark* (3) or in *Reg.* v. *Soutter* (2); but the language of the Master of the Rolls in giving judgment in the latter case can hardly be reconciled with any other view than that he considered that it is a necessary condition of the qualification that the person to be qualified must be both occupier of and rated in respect of the same premises, and that the premises in respect of which he is rated must be neither more nor less than those which he occupies, nor those which he occupies less at all events than those in respect of which he is rated. He expresses himself thus at page 60: "In my opinion the proper construction of the enactment is that a person to be qualified must be rated in respect of premises upon the requisite amount of rental, and must be properly rated in respect of such premises, that is to say, he must occupy the premises"—by which I understand the whole of the premises in respect of which he is rated, and not a part only. He further says that it seems to him, "That the meaning of the section is that the person to be qualified must be rated on premises to the requisite amount, and must occupy the premises for which he is so rated." In the cases cited the attention of the Court does not appear to have been specifically called to the definition of the word "rental" as given in s. 8 of 19 & 20 Vict. c. 112, upon which Mr. Bankes not unreasonably laid great stress in his able argument for the plaintiff. That section appears to

(1) 15 Q. B. D. 82; 16 Q. B. D. 79.
(2) [1891] 1 Q. B. 57.
(3) See 16 Q. B. D. at p. 82, per Lord Esher, M.R., at the end of his judgment.

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Denman, J.

me practically to amount to an enactment that the "rateable value" as it appears in the rate-book shall be the only evidence of the rateable value of the premises therein mentioned, and only evidence of the value of those premises as a whole, and that if there be no separate rateable value of the premises occupied there is no evidence of the amount of the "rental" of the premises occupied by the party rated which falls within the 8th section of 19 & 20 Vict. c. 112. In other words, I think that the object of the two enactments was to provide that the party to be qualified should be able to point to the rate-book and to the rate-book only as evidence of the sufficiency of his qualification as regards "rental or rateable value" of the premises which he occupies, and that by mixing up other premises which he does not occupy with those which he does occupy in the rate-book one of the very conditions of his qualification fails.

Sect. 8 of 19 & 20 Vict. c. 112, enacts that the amount specified in the column headed "Rateable Value" shall be deemed the "rental" for the purposes of the earlier Act. The earlier Act by s. 6 says, that the vestrymen must be rated upon a rental of not less than 40*l.* (i.e., after the later Act, upon a "rateable value" as shewn in the column of a rate) and that he must be "the occupier of a house, lands, tenements, or hereditaments, and be rated or assessed *upon such rental as aforesaid.*" I think that this means that the rateable value of the premises he *occupies* shall appear in the rate-book and be the evidence of the rental of such premises, and that it is not intended that a person should be able to make out a qualification, in a case where he has been rated only in the lump for premises which he does occupy and others which are occupied by other people, by calling witnesses to shew that if he had been separately rated for the premises he occupies they ought to be rated at 40*l.* or upwards.

I thought it right to inquire of Lopes, L.J., whether the view taken by him in *Mogg* v. *Clark* (1) and *Reg.* v. *Soutter* (2) was based upon this view of the statutes, and he authorizes me to say that it was, and that he understood the judgment of the Master of the Rolls in *Reg.* v. *Soutter* (2) to be founded on the same understanding of the intention of the legislature.

(1) 15 Q. B. D. 82. (2) [1891] 1 Q. B. 57.

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GORDON v. WILLIAMSON.

Denman, J.

This case afforded an illustration of the inconvenience which any other construction of the statutes would involve, for it is obvious that it is not a desirable thing that any person who either claims or objects to the qualification of a vestryman should be liable to the expensive inquiry which would almost invariably attend the ascertainment by conflicting evidence of surveyors of the rateable value of a portion of premises already valued as a whole by the responsible authorities. I think it was the intention of the legislature to prevent any such inconvenience by the enactment I have been discussing.

I am of opinion that the plaintiff is entitled to judgment in respect of the five votes proved, and I give judgment for him for 250*l.*

Judgment for the plaintiff.

Solicitors for the plaintiff: *Oldfield, Bartram, & Oldfield.*
Solicitor for the defendant: *H. B. Wedlake.*

J. F. C.

[IN THE COURT OF APPEAL.]

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March 14, 15.

THE QUEEN *v.* JUSTICES OF GLAMORGANSHIRE.
THE QUEEN *v.* JUSTICES OF PONTYPOOL.

Licensing Acts—Licensing Justices—"Court of Summary Jurisdiction"—Refusal to renew Licence—Appeal—Notice of Appeal, service of on Clerk to Justices—Case, power to state—Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 27, 37—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 31, 33—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *s.* 7—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 13, *sub-s.* 11.

By s. 13, sub-s. 11, of the Interpretation Act, 1889, it is provided that "the expression 'court of summary jurisdiction' shall mean any justice or justices of the peace. . . . whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law":—

Held, that justices acting as licensing justices, under 9 Geo. 4, c. 61, are, by virtue of the above definition, a "court of summary jurisdiction," within ss. 31 and 33 of the Summary Jurisdiction Act, 1879, which provide respectively for service of notice of appeal from the decision of such a court upon their clerk, and for statement of a case by them on a question of law.

THE first of these cases was an appeal from an order of the Queen's Bench Division, directing that a writ of mandamus

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should issue to justices in quarter sessions to hear and determine an appeal. The facts were as follows: The applicant for the writ was the holder of a licence for a public-house at Cardiff. Before the general annual licensing meeting for the borough was held in 1891, he was served, on behalf of the head constable of the borough, with notice of opposition to the renewal of his licence on certain grounds specified. At such meeting he duly applied for the renewal of his licence, which was opposed by the head constable; and, after hearing evidence on both sides, the justices refused his application. The applicant served notice of his intention to appeal to quarter sessions from the decision of the justices on some, but not all, of the justices who heard the case, on the head constable, and on the clerk to the justices. When the appeal came on for hearing at the quarter sessions, the objection was taken that the notice of appeal had not been served on all the justices who adjudicated in the case, as required by the Licensing Act, 1828 (9 Geo. 4, c. 61, ss. 27, 37). The court of quarter sessions upheld the objection, and refused to hear the appeal.

A rule nisi for a mandamus having been obtained, on the argument of the rule, the Divisional Court (Lawrance and Wright, JJ.), held that by virtue of sub-s. 11 of s. 13 of the Interpretation Act, 1889, justices acting as licensing justices, under 9 Geo. 4, c. 61, were to be considered as a "court of summary jurisdiction," within the Summary Jurisdiction Act, 1879, s. 31, which provides for service of notice of appeal from a court of summary jurisdiction on the other party and on the clerk of the Court. They, therefore, held that the notice of appeal was duly served, and made the rule for a mandamus absolute. The justices appealed.

The second case was an appeal from an order of the Queen's Bench Division directing justices to state a case for the opinion of the Court.

In this case the justices had refused an application for a renewal of a licence. The applicant desiring to question their decision on the ground that it was erroneous in point of law, applied to the justices to state a case, but they refused to do so. On an application for an order that they should state a case, the Divisional Court (Hawkins and Wills, J.J.), following

the decision in the first case, made the order applied for. The justices appealed. (1)

Sir *R. E. Webster, A.G.*, and *H. Sutton* (*Arthur Lewis*, and *W. Daniell*, with them), for the justices, the appellants in the respective cases. The question in both cases depends on whether justices acting as licensing justices under 9 Geo. 4, c. 61, are made by the Interpretation Act, 1889, s. 13, sub-s. 11, a court of summary jurisdiction for the purposes of certain provisions of the Summary Jurisdiction Act, 1879, relating to amendment of procedure, viz., ss. 31 and 33. In the first case, if the service of the notice of appeal, not being on all the justices who adjudicated, be not good under 9 Geo. 4, c. 61, ss. 27 and 37, it would nevertheless be good if the Summary Jurisdiction Act, 1879, s. 31, applied. The Summary Jurisdiction Act, 1879, s. 50, defines the expression "the Summary Jurisdiction Acts" as meaning "the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and this Act,

(1) By s. 13, sub-s. 11, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), "the expression 'court of summary jurisdiction' shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his commission, or under the common law."

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, provides that "where any person is authorized [by this Act or by any future Act] to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such Court, subject to the conditions and regulations following:—

"(2.) The appellant shall within the prescribed time, or, if no time is prescribed, within seven days after the day on which the said decision of the Court was given, give notice of appeal by serving on the other party, and on the clerk of the said court of summary jurisdiction, notice in writing of his intention to appeal, and of the general grounds of such appeal." Sect. 33 provides that, any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned; and, if the Court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated. The Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), repeals the words "by this Act or by any future Act" in s. 31 of the Act of 1879.

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and any Act past or future amending the Summary Jurisdiction Act, 1848, or this Act," and the expression "court of summary jurisdiction" as meaning "any justice or justices of the peace or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, or any of such Acts." The scope of the Act is confined to matters of summary jurisdiction, such as are within the provisions of 11 & 12 Vict. c. 43 (Jervis's Act), viz., cases where offences are punishable by summary conviction upon information, or where orders for payment of money may be made on complaint. It is clear that the granting or refusal of licences under 9 Geo. 4, c. 61, does not come within that definition, and that the licensing justices were not a court of summary jurisdiction within the meaning of the Summary Jurisdiction Act, 1879, as it originally stood. Sect. 31 of that Act applies to appeals from convictions or orders, and its provisions are not appropriate to appeals from the decisions of licensing justices, because it provides for service of notice of appeal on "the other party." There is not any "other party" in the proper sense in a licensing case, for the justices may act on their own initiative, and any person opposing the renewal of the licence is not properly speaking a party. By the Summary Jurisdiction Act, 1884, s. 7, the definition of "court of summary jurisdiction," given in s. 50 of the Act of 1879, was extended, and the expression was defined to mean "such justice, justices, or magistrate as therein mentioned, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his or their commission, or by the common law." That provision is repealed by the Interpretation Act, 1889, s. 41; but the provision of s. 13, sub-s. 11, of that Act is substantially a re-enactment of it. The extension of the definition given by the Summary Jurisdiction Act, 1879, was necessary in order to meet a doubt which had arisen whether the provisions of the Summary Jurisdiction Act, 1879, were applicable to various matters in respect of which justices exercise summary jurisdiction under other Acts, such as those relating to weights and measures, public health, and education. It is contended that the generality of the terms of the latter part of the extended definition must be restricted by reference to

what goes before, and the general scope of the legislation. It was only intended to deal with other cases of jurisdiction ejusdem generis with the jurisdiction to which Jervis's Act applied, i.e., cases of summary jurisdiction upon information or complaint. The granting or refusal of a licence by justices under 9 Geo. 4, c. 61, is not such a case. It was never intended to apply to appeals under 9 Geo. 4, c. 61, s. 27, the procedure given by the Summary Jurisdiction Act, 1879, the scope of which relates to summary proceedings properly so called. This is shewn by the fact that the provisions of 9 Geo. 4, c. 61, s. 27, are not included in the extensive repeal of sections contained in the schedule to the Summary Jurisdiction Act, 1884. Having regard to the fact that in so many cases the previous inconsistent legislation is expressly repealed, it cannot have been intended by implication to repeal the provisions of 9 Geo. 4, c. 61, s. 27, and apply the procedure contained in the Summary Jurisdiction Act, 1879, to licensing justices.

The same reasoning applies to the question in the second case, viz., whether a case can be stated. It is clear that prior to 1884 the licensing justices could not state a case. They could not state a case under 20 & 21 Vict. c. 43, because that Act only applies where there is a determination on information or complaint: *West* v. *Potts.* (1) The question whether a case can be stated under the Summary Jurisdiction Act, 1879, s. 33, depends on whether the licensing justices are a "court of summary jurisdiction" within the Interpretation Act, 1889.

[They cited *Reg.* v. *Justices of Bedfordshire* (2); *Reg.* v. *Justices of Cheshire* (3); *Ex parte Curtis.* (4)]

Sir Henry James, Q.C., and *Lawson Walton, Q.C.* (*Poland, Q.C.*, and *J. Paterson*, with them), for the respondent, the applicant for the mandamus, in the first case. The words of the definition in s. 13, sub-s. 11, of the Interpretation Act, 1889, in their natural sense, clearly include the case of justices acting under 9 Geo. 4, c. 61, for that is an Act other than the Summary Jurisdiction Acts. The contention for the appellants is that words must be introduced rendering the latter part of the definition almost

(1) Law Rep. 6 Q. B. 88, note (1).
(2) 11 A. & E. 134.
(3) 11 A. & E. 139.
(4) 3 Q. B. D. 13.

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nugatory, and confining the meaning to justices acting under Summary Jurisdiction Acts. The natural meaning of words in an Act is not to be restricted, unless some injustice or absurdity is produced by applying the words in that meaning. It is contended that, on the contrary, the intention of the legislature, as appearing from the course of legislation on the subject, clearly was that in all cases where justices exercise jurisdiction as such and there is an appeal from them, there should be uniformity of procedure, and parties should be able easily to ascertain to whom they must give notice of appeal. It would really be an anomaly that in cases of convictions where justices might be personally liable, if their decisions were erroneous, a notice of appeal might be served on their clerk, but where they could not be personally liable in any way, and, therefore, have no personal interest, it should be necessary to ascertain and serve the justices who adjudicated—a matter often very difficult. The appellants rely on the fact that s. 27 of 9 Geo. 4, c. 61, is not expressly repealed by the Summary Jurisdiction Act, 1884; but it is obvious that it could not be so repealed. It not only deals with procedure, but gives substantive rights. It gives the right of appeal from the decision of the justices, and gives power to the quarter sessions, where the licence has been refused, to grant or transfer the licence in the event of the appeal being successful. It could not, therefore, be repealed by an Act dealing with procedure like a mere procedure section. The sections expressly repealed by the Summary Jurisdiction Act, 1884, are provisions with regard to procedure merely. This is a composite section dealing partly with substantive rights and partly with mere procedure; and it could not conveniently be dissected by a repealing enactment. The decision in *Reg.* v. *Mayor of London* (1) is directly in favour of the respondent's contention.

[They also cited *Rex* v. *Justices of Staffordshire* (2); *Rex* v. *Justices of Warwickshire* (3); *Reg.* v. *Justices of Glamorganshire.* (4)]

Lumley Smith, Q.C., and *J. Paterson*, (*Glascodine*, with them), for the respondent in the second appeal, contended that s. 33 of the Summary Jurisdiction Act, 1879, applied on the same

(1) 52 J. P. 70; 57 L. T. 491.
(2) 4 A. & E. 842.
(3) 6 A. & E. 873.
(4) 22 Q. B. D. 628.

grounds as those relied upon for the respondent in the first case.

Arthur Lewis, in reply. In *Reg.* v. *Mayor of London* (1) the jurisdiction of the magistrate must have originated by a complaint.

LORD ESHER, M.R. These are cases arising with regard to the refusal to renew licences by justices under 9 Geo. 4, c. 61. The question in one case is whether the party desiring to appeal against the decision of the justices has given the right notice of appeal; the question in the other is whether the justices can be ordered to state a case. In the first case, on the one side, it is said that the procedure in such cases is governed by the 27th section of 9 Geo. 4, c. 61, and by that only, and that, the procedure given by that Act not having been followed, the appeal could not be heard. On the other side, it is said that, although before 1884 the justices acting under 9 Geo. 4, c. 61, could not be said to be a court of summary jurisdiction, but were another kind of court governed by the provisions of that Act only, after that date, by reason of the provisions of the 7th section of the Summary Jurisdiction Act, 1884, and now by reason of the provisions of the Interpretation Act, 1889, s. 13, sub-s. 11, what such justices do under the Act of 9 Geo. 4 is to be considered as done by a court of summary jurisdiction. If so, the provisions made by the Summary Jurisdiction Acts with regard to procedure in the case of appeals from courts of summary jurisdiction apply, and in the one case the notice of appeal was rightly served, and in the other the justices have power and can be ordered to state a case. I think that it is true to say that, until the later Acts altered the procedure, the justices acting under the Act of 9 Geo. 4 were not a court of summary jurisdiction. Therefore, the whole question is whether the legislation subsequent to 1879 does not on a true interpretation of it oblige us to treat what was done by the justices in these cases as done by them as a court of summary jurisdiction. It is only necessary to consider the 11th sub-section of the 13th section of the Interpretation Act, 1889, for on that enactment the matter now depends. The question is whether that enactment does not on the true interpretation of it

(1) 52 J. P. 70; 57 L. T. 491.

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transform the justices acting under 9 Geo. 4 into a court of summary jurisdiction for the present purpose. It enacts that the expression "court of summary jurisdiction" shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his commission, or under the common law." Taking the ordinary grammatical meaning of that language, the first alternative exhausts all things done under the Summary Jurisdiction Acts. The second is applicable to things done under Acts other than the Summary Jurisdiction Acts. We have to consider whether that language applies to justices acting under the statute 9 Geo. 4, c. 61. Giving to the language of the section its ordinary meaning, it appears to me plain that it does so apply, and, therefore, that the provision of the Summary Jurisdiction Act, 1879, with regard to the service of notice of appeal applies. So far as subsequent legislation is inconsistent with that which went before, the former legislation is inferentially repealed; therefore the notice of appeal was rightly served on the clerk to the justices. It likewise follows that there is a power given to the justices by the later Act which did not exist under the former Act, viz., power to state a case. It does not follow from what we hold that the whole of s. 27 of 9 Geo. 4, c. 61, is repealed; only so much is repealed as is inconsistent with the rules as to procedure laid down in the later Act. The appeal is still given by s. 27 of the former Act, and every enactment of that section still remains in force except so far as the later legislation is inconsistent with it. What I have said appears to me to agree with the reasoning on which the decision in *Reg.* v. *Mayor of London* (1) was founded. That decision is not binding on us, and it was urged that there was a difference in the facts of that case. It was said that the proceedings before the magistrate in that case must have been founded on a complaint; but here the origination of the justices' jurisdiction is not by a complaint. That difference does not, however, seem to be

(1) 52 J. P. 70; 57 L. T. 491.

material to the reasoning of the judgment. It proceeded on the view that the Court was bound by the ordinary sense of the words "under any other Act," and there is no suggestion in it that their application was limited to cases where there was an information or complaint. In my opinion, the reasoning on which that decision proceeded was correct. I, therefore, think that the proposition laid down by the counsel for the respondents is the right one, and is a good form for expressing what must be decided in all similar cases, viz., that the provisions of the Summary Jurisdiction Acts as to procedure are intended to apply to all acts of justices where they are acting as justices in any matter in which an appeal may lie. For these reasons, I think that these appeals must be dismissed.

FRY, L.J. I agree that these appeals must be dismissed. The question which we have to determine is, whether or no justices acting under the provisions of 9 Geo. 4, c. 61, are a "court of summary jurisdiction" within the meaning of the Interpretation Act, 1889. The 11th sub-section of the 13th section of that Act provides that "the expression 'court of summary jurisdiction' shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law." I cannot imagine a more exhaustive definition. It appears to me to include a justice of the peace doing anything, for it applies whether he is acting under a statute, or at common law, or by virtue of his commission. I cannot conceive how a person ever can act as a justice except under one of these heads. The effect seems to be that a "court of summary jurisdiction" means a justice or justices of the peace acting as such. We have to consider whether there is anything inconsistent with the generality of that expression when it is applied to justices acting under the Act 9 Geo. 4, c. 61. If from so applying it any injustice resulted, or any inconsistency so glaring as to shew clearly that it could not

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have been intended to be so applied, or if any absurd result followed, we should be bound to limit in some way the generality of the expression. In the absence of any such injustice, or inconsistency, or absurdity, we must construe the words in their natural signification. Let us inquire, then, whether any injustice, inconsistency, or absurdity results from applying the words in their natural sense. The statute 9 Geo. 4, c. 61, gives a discretionary power to the magistrates to grant licences, which is to be exercised at a meeting to be called the general annual licensing meeting: it prohibits the doing of certain things without a licence under penalties; and by s. 27 an appeal is given in all cases where any person thinks himself aggrieved by any act of a justice done in or concerning the execution of the Act. It is obvious that the right of appeal so given would apply to a variety of determinations: among others, to the refusal to renew a licence. The first part of the section gives the right of appeal; and then follows a proviso which applies to procedure and specifies the time within which, and the person to whom the notice of appeal is to be given. Then there follows a part of the section which clothes the justices in quarter sessions with certain powers for dealing with the appeal, such as the power to give costs and to grant a licence where it has been improperly withheld. Such is the general scope of the section. It gives a right of appeal, and then contains certain provisions as to procedure. Is there anything unjust or absurd in applying to justices acting under this Act the definition of a court of summary jurisdiction given by the Interpretation Act, 1889, in its full natural sense? I can find nothing. It is to be observed, that the effect of the construction we are giving to the Acts is that s. 27 is not repealed, but remains in force except so far as its provisions with regard to procedure are repealed by the enactments of the general Act which provide another procedure. One point pressed upon us was that the Summary Jurisdiction Act, 1879, s. 31, in the case of appeals there dealt with, provides for service of notice of appeal on the other party; and it was urged that there is no other party in licensing cases. If so, the only result, in my judgment, is that that part of the provisions of the Summary Jurisdiction Act will not be applicable to the

present case. I cannot see that any injustice, inconsistency, or absurdity follows from the application of the words of the definition in the Interpretation Act in their natural signification. We are, therefore, I think, bound to give them that signification, and to hold that justices acting under the statute 9 Geo. 4, c. 61, are a court of summary jurisdiction within the meaning of that definition, and consequently the rules of procedure given by the Summary Jurisdiction Act, 1879, apply. I have only one other observation to make. I desire to observe that what we are holding is, not that the Acts of 1884 and 1889 in substance make justices acting as such in all cases courts, but only that they put them in the same position as courts of summary jurisdiction for the purpose of certain provisions as to procedure.

LOPES, L.J. This is a question of some importance. The question is whether justices acting as licensing justices under the Act of Geo. 4 are a court of summary jurisdiction within the meaning of the Summary Jurisdiction Acts. Before 1884, I should say that, having regard to the nature of the functions exercised by the justices under the Act of Geo. 4, they were not a court of summary jurisdiction, and, therefore, service of notice of appeal on their clerk would not be sufficient, and there would be no power to state a case. It was said that the later legislation introduced a change, and made licensing justices a court of summary jurisdiction for the purposes of procedure. It is desirable to consider the course of legislation on the subject. By the Summary Jurisdiction Act, 1879, s. 50, it was provided that the expression "court of summary jurisdiction" should mean "any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, or any of such Acts." Then comes the Summary Jurisdiction Act of 1884, the 7th section of which recites the definition given by the previous Act, and that doubts have arisen as to whether the 50th section of the previous Act extends to such justice, justices, or magistrate when acting under some Act other than the Summary Jurisdiction Acts; and enacts that "the above-recited definition of 'court of summary jurisdiction' in s. 50

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of the Summary Jurisdiction Act, 1879, includes such justice, justices, or magistrate as therein mentioned, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his or their commission, or by the common law." Here is a section containing words as strong as could be used, and introduced for the purpose of removing doubts which had existed. Then we come to the Act of 1889, and in s. 13, sub-s. 11, of that Act we find words substantially identical with those in the Act of 1884. That sub-section provides that "the expression 'court of summary jurisdiction' shall mean any justice or justices of the peace, or any other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his commission, or under the common law." It appears to me that the words both of the Act of 1884 and that of 1889 are perfectly clear; and, reading them in their ordinary sense, I cannot put any other construction on them than that for the sake of uniformity of procedure the legislature made courts which were not so before courts of summary jurisdiction. That being so, it seems to me clear that the provisions of the Summary Jurisdiction Act, with regard to the persons on whom notice of appeal is to be served and the time when it is to be given, are applicable to proceedings of the justices under the Act 9 Geo. 4, c. 61, s. 27. I think that the intention of the legislature was to make justices acting under any other Act a court of summary jurisdiction within the scope of the Summary Jurisdiction Acts. I quite agree with the decision in *Reg.* v. *Mayor of London.* (1) For these reasons I think the appeals should be dismissed.

Appeals dismissed.

Solicitors for appellants: *Hare & Co., for the Solicitor to the Treasury.*

Solicitors for respondents: *Bell, Brodrick & Co., for H. Cousins, Cardiff; Riddell & Co., for Jones, Cardiff; Few & Co., for Blythway, Pontypool.*

(1) 52 J. P. 70; 57 L. T. 491. E. L.

THE QUEEN *v.* JUSTICES OF SURREY.

1892
March 7.

Highway—Diversion—Affixing of Notices—End of Highway—Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 85.

By s. 85 of the Highway Act, 1835, which deals with proceedings for the diversion of highways, it is provided that certain notices shall be affixed "at the place and by the side of each end of the said highway from whence the same is proposed to be . . . diverted":—

Held, that by the expression "end of the highway" is meant the end of the portion proposed to be diverted.

MANDAMUS to justices.

In 1891 proceedings for the diversion of a portion of a highway near Abinger, in the county of Surrey, were taken under ss. 84, 85, of the Highway Act, 1835, by a Colonel Lewin, who was the owner of the soil over which such portion of the highway passed. The highway in question was a cross road connecting two parallel main roads, one leading from Pitland Street to Abinger, the other from Leith Hill to Wotton.

It commenced at a point D in the Abinger road, passed through a point A, and terminated at a point B in the Wotton Road. It was admitted by Colonel Lewin to be a public bridleway and footpath; but, although occasionally used by members of the public as a cartway, the right of the public to use it for that purpose was disputed. The portion of such highway which it was proposed to divert was that lying between the points A and B. It was proposed to stop up such portion and substitute in lieu thereof a new highway from A to a point C in the Wotton Road, which new highway was to be used by the public for all purposes, including that of a cartway. The portion of the road between A and B was wholly in the parish of Abinger, while the greater part of that which lay between A and D was in the parish of Holmbury St. Mary. The notices required by s. 85 (1) were

(1) By s. 85 of 5 & 6 Wm. 4, c. 50, "Where it shall appear upon view of two justices of the peace . . . that any public highway may be diverted and turned . . . so as to make the same nearer or more commodious to the public, . . . or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice, in the form or to the effect of Schedule (No. 19) to this Act annexed, in legible characters, at the place and by the side of each end of the said

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affixed at the points A and B, and also on the door of Abinger Church, but not at the point D, nor on the door of the church at Holmbury St. Mary. Two justices certified that the proposed new highway from A to C was both nearer and more commodious to the public than that from A to B. In the various notices throughout the proceedings, and also in the certificate, the portion proposed to be diverted was spoken of as portion of a "highway or bridleway and footpath." No appeal was brought against the certificate; but the justices at quarter sessions nevertheless refused to enrol the certificate on the ground that notices ought to have been affixed at point D and on the church door at Holmbury St. Mary.

A rule nisi having been obtained at the instance of Colonel Lewin calling on the justices to shew cause why a mandamus should not issue commanding them to order the certificate to be enrolled:—

H. Avory, for the justices, shewed cause. It is not a sufficient compliance with s. 85 to affix the notices at the ends of the portion of the highway proposed to be diverted; they must be affixed at the ends of the highway itself—that is to say, at the points of junction with the main roads. In a small cross road such as this the notices would be likely to escape observation unless placed where they could be seen from the main road. If, as is contended, the "end of the highway," under s. 85, means the end of the highway as a whole, then the certificate was also bad for the want of a notice on the door of Holmbury Church. A further objection to the enrolment of the certificate is that, the highway proposed to be diverted being described as a highway or bridleway and footpath, it would be left in doubt whether the public were still entitled to use it as a cartway, notwithstanding that it was stopped up for other purposes.

R. Bray, in support of the rule. The word "highway" in s. 85 means the portion to be diverted or stopped up, as the case may

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nighway from whence the same is proposed to be turned, diverted, or stopped up, . . . and to affix a like notice on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, . . . or any part thereof, shall lie."

be. It is clear that it must have that limited meaning in the case of stopping up; and if so, it must equally have that limited meaning in the case of diversion. With regard to the other objection as to the ambiguity of the certificate, the public cannot be injured by it; for, assuming that the other side's contention is right, the public would have two cartways instead of one.

Avory, in reply.

CAVE, J. I am of opinion that this rule should be made absolute. I agree with Mr. Avory that the Court ought not to compel the sessions to enrol the certificate if it appears to be bad on the face of it, or if there exist reasonable grounds why it should not be enrolled. The only point taken by the sessions was that the notices ought to have been put up, not only at the points A and B, at which the notices were in fact put up, but also at the point D, which is alleged to be one end of the highway. But I do not think that that is the sense in which the word "highway" was intended to be understood in s. 85. For some purposes, no doubt, you may use the term highway to signify a road which leads from one village to another village. But, in the group of sections of the Highway Act which deal with the subject of stopping up or diverting highways, I think it clear that it does not mean that, but means that particular portion of highway which is intended to be stopped up, or which is intended to be diverted, as the case may be. In ss. 89 and 91, which deal with the subject of appeal to the quarter sessions, the part of the highway which is to be stopped up and for which a new road is to be substituted is spoken of as the "old highway." It seems clear that that expression "old highway," as applied to the present case, would mean the part of the highway between the points A and B, and would have no reference at all to the part between the points A and D. Sect. 85 provides that the notices are to be put up "at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up." If I understood Mr. Avory rightly, he admitted that, so far as the stopping up of a highway is concerned, the ends referred to would be A and B, but that, when it came to a

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CAVE, J.

question of diversion, the ends would be D and B. But it would be a strange construction of the statute, if, precisely the same words being used with regard to stopping up and with regard to diversion, we were to construe it differently according as it is used in the one case or in the other. Moreover, there is very great difficulty in drawing any distinction between stopping up and diversion. In one sense the old road here is stopped up. It is not, indeed, stopped up in the sense that nothing is substituted for it; another highway is given instead of it from A to C; but in the ordinary sense of the term, so far as it goes in the line from A to B, it is stopped up, or, at all events, will be stopped up if this mandamus issues. In my opinion the words "at the place," and "by the side of each end of the said highway," do not refer to different points; but the latter words are explanatory of the former, and were inserted for the purpose of making it clear what the place is at which the notices are to be posted. Our view upon this point disposes also of the objection that no notice was posted on the door of the church of Holmbury St. Mary. Another objection was, that it being a disputed question whether the highway proposed to be stopped up was a cartway or not, it did not appear from the notices or the certificate that it was to be stopped up otherwise than as a bridleway and footpath. But there is nothing in that objection; for, assuming that it should turn out to have been in fact a cartway as well as a bridleway and footpath, and that the effect of the certificate is only to stop it up as a bridleway and footpath, leaving it open still to the public for use as a cartway, the public cannot in any way be damnified by that. The mandamus must go.

COLLINS, J. I am of the same opinion.

Order absolute for mandamus.

Solicitor for prosecutor: *E. R. Keele, for Down, Scott, & Down, Dorking.*

Solicitors for justices: *E. W. & R. Oliver.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
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Dec. 14.

THE QUEEN *v.* FARMER AND ANOTHER, JUSTICES OF SALFORD.

Bastardy—Service of Summons—Validity of Service—Jurisdiction of Justices—Certiorari—"Last place of abode"—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *ss.* 3, 4.

At the hearing of an application for an affiliation order, evidence was given that the summons had been served by being left at the house where the person alleged to be the father of the child resided. He did not appear, and the justices heard evidence and adjudged him to be the putative father of the child, and made an order accordingly. He subsequently applied for a certiorari to bring up this order to be quashed, on the ground that the summons had not been properly served; and he established that at the date of the service of the summons he had left the house at which it was served, and was resident in America:—

Held, that as the jurisdiction of the justices only attached on proof that the summons was duly served, the Court had power to inquire into the validity of the service, and would grant a certiorari if it were shewn that the service was invalid:

Held, also, that as the person served had, at the date of the service of the summons, a place of abode in America, that, and not the house at which the summons was served, was at that time his "last place of abode" within s. 4 of the Bastardy Laws Amendment Act, 1872, and that the service was consequently invalid.

Reg. v. *Evans* (19 L. J. (M.C.) 151, and sub-nom. *Ex parte Rice Jones*, 1 L. M. & P. 357) approved.

APPLICATION by R. B. Riley for a rule nisi for a certiorari to bring up an affiliation order made by justices against him under the Bastardy Laws Amendment Act, 1872, s. 4. The application was refused by a Divisional Court, but granted by the Court of Appeal.

The facts as disclosed by the affidavits were as follows: Elizabeth Howarth, the mother of a bastard child, issued a summons on March 15, 1891, against Riley, alleged to be the putative father of the child. The summons was on the same day left at the house of Riley's father. At the hearing of the summons Riley did not appear; but his father attended, and stated that Riley had gone to America before March 15, and intended to reside there. Riley while in England had resided with his father, and there was evidence before the justices conflicting

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with that of the father, to the effect that Riley had been seen in the neighbourhood since March 15. The justices found that the summons had been duly served by being left at Riley's last place of abode the requisite time before the petty sessions, and they heard evidence and adjudged that he was the putative father of the child, and made an order accordingly for payment of a weekly sum for its maintenance and education.

The affidavits used in support of the application alleged that Riley left his father's house on February 19, 1891, and arrived in America on March 3 following; and a letter was produced purporting to be written at Boston in America from Riley to his father, dated March 5, and bearing the Boston post-mark of that date. There was also other evidence to shew that the witness who had deposed to seeing Riley after March 15 admitted that she had made a mistake.

Cluer, for the complainant Elizabeth Howarth, shewed cause. The justices heard conflicting evidence as to what was Riley's last place of abode, and their conclusion cannot be reviewed: *Brittain* v. *Kinnaird* (1); *Reg.* v. *Bolton* (2); *Reg.* v. *Smith* (3); *Reg.* v. *Higham.* (4) The cases of *Reg.* v. *Evans* (5) and *Reg.* v. *Lee* (6) are opposed to this view; but they cannot be supported. Further, "last place of abode" means the last place of abode in England, and cannot be taken to include any foreign residence. *Berkley* v. *Thompson* (7) is distinguishable, for there the summons was served out of the jurisdiction.

Le Riche, in support of the rule, was not called on.

LORD ESHER, M.R. In this case the magistrates have made an order against the applicant adjudging him to be the putative father of an illegitimate child, and ordering him to pay money for its support. He makes this application on the ground that the magistrates had no jurisdiction, and it is not in respect of any proceedings to enforce the order, but for a certiorari to

(1) 1 B. & B. 432.
(2) 1 Q. B. 66.
(3) Law Rep. 10 Q. B. 604.
(4) 7 E. & B. 557; 26 L. J. (M.C.) 116.
(5) Sub-nom. *Ex parte Rice Jones*, 1 L. M. & P. 357; 19 L. J. (M.C.) 151.
(6) 52 J. P. 344.
(7) 10 App. Cas. 45.

quash the order. If the application were in respect of any proceedings to enforce the order of the magistrates, *Brittain* v. *Kinnaird* (1) would be conclusive to shew that as the magistrates had jurisdiction to inquire whether service of the summons had been duly made, the Court would not inquire whether their determination was right or wrong. If the application is for a certiorari to bring up the order itself, to quash it for want of jurisdiction, then *Reg.* v. *Evans* (2) is an authority to shew that the Court may inquire into the evidence on which the magistrates formed an opinion in the first instance that they had jurisdiction, and the case of *Reg.* v. *Lee* (3) is to the same effect. I think we ought not to overrule *Reg.* v. *Evans* (2), but should support the distinction I have adverted to, that in proceedings to enforce the order of justices in a case over which the justices had jurisdiction, the Court will not hear evidence to impeach their decision on the facts; but that in proceedings to bring up and quash the order, the Court is bound to consider the evidence before the magistrates, but is not bound to confine itself to that evidence, but may hear other evidence to arrive at a determination of the question of jurisdiction. It is not material to determine whether, if the only evidence before us were that which the magistrates had before them, we should agree with the conclusion to which it is clear they came, that the summons had come to Riley's knowledge; for it has now been made plain that the man had left his father's house before the service of the summons and gone to America, and that the finding of the magistrates cannot be supported on the view that the summons had come to his knowledge. But then we have to consider whether he had at the time the summons was served a place of abode in America. If he went there with the intention of returning, or for the mere purpose of avoiding service, I should say he had no place of abode in America. In such a case it would be true to say that his last place of abode was his father's house. Is there sufficient evidence on which we can safely say that he went to America to live there? I think that is the

(1) 1 B. & B. 432.
(2) Sub-nom. *Ex parte Rice Jones*, 1 L. M. & P. 357; 19 L. J. (M.C.) 151.
(3) 52 J. P. 344.

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Lord Esher, M.R.

conclusion we must come to; and if so, he had a place of abode in America. Then we come to the question of the construction of the 4th section, and must determine whether the expression "last place of abode" means last place of abode in England, though he has at the time a place of abode abroad. I take it that if a man goes to a new place of abode in England, his last place of abode is that to which he goes, and in which he is abiding. Does it make any difference that the place of abode is abroad, where the man is not merely wandering about, but has got a fixed place of abode. I think not. I do not see anything to justify the introduction into the section of the words "in England." If I am right as to this it is sufficient to determine the case, because we have come to the conclusion that this man had a place of abode in America.

There is a further point in the case, which is one mentioned by Lord Selborne in *Berkley* v. *Thompson* (1), whether, if Ridley had no fixed place of abode in America, as there is provision for service within twelve months of his return, he could be served by leaving the summons at his last place of abode here. I do not think it is necessary to determine that in the present case in which it is clear that the service at his father's house was not service at his last place of abode within the Act. If there was no service of the summons the magistrates had no jurisdiction to make an order on it. We must, therefore, allow the appeal and quash their order.

LOPES, L.J. The application before us is for a certiorari to bring up and quash the order on the ground of want of jurisdiction in the justices. It is to be observed that it is not an application to bring up an order for the purpose of quashing it on its merits; in such a case *Brittain* v. *Kinnaird* (2), and *Reg.* v. *Bolton* (3), would be applicable. This case appears to me to be on all fours with *Reg.* v. *Evans* (4), and *Reg.* v. *Lee* (5), which shew that the Court may inquire into the evidence on the preliminary point whether the summons had been duly served, and

(1) 10 App. Cas. 45.
(2) 1 B. & B. 432.
(3) 1 Q. B. 66.
(4) Sub-nom. *Ex parte Rice Jones*, 1 L. M. & P. 357; 19 L. J. (M.C.) 151.
(5) 52 J. P. 344.

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may receive evidence as to this not confined to the evidence which was before the justices. The evidence before us is strong to shew that the applicant was not in this country on March 15. But it is said that he may be served by a summons left at his last place of abode; but I think, on the evidence, that his father's house was not his last place of abode at the date of the summons, but his brother's house in America. I agree that the case would be different had it been made out that he went away merely to avoid service, and for that *Reg.* v. *Evans* (1) is an authority; but of that I see no evidence, or that he went away merely for a temporary purpose. I think, therefore, that in the circumstances of this case, the requirement of the statute that service should be at his last place of abode has not been satisfied, and that the rule for a certiorari should be made absolute.

KAY, L.J. This case raises two questions, whether this Court or the Divisional Court has power to entertain the motion for a certiorari, and whether (supposing there is such a power) the decision of the magistrates was right.

As to the first point, it would be a serious matter if the magistrates on such an application as this could make an order behind a man's back, and that when he discovers what has been done, although it is entirely wrong, the Court should have no power to bring up the order. There is distinct authority to the contrary. In *Brittain* v. *Kinnaird* (2), and *Reg.* v. *Bolton* (3), both the parties were present at the hearing; but in *Reg.* v. *Evans* (1), followed as it was by *Reg.* v. *Lee* (4), the very point we have been discussing was decided, and, as I think, rightly decided.

The question then arises whether there was proper service of the summons. It seems to me clear that the summons did not come to his knowledge, as at the time it was left at his father's house he had been residing a fortnight in America. Still, the service would be good if the summons was left at his last place of abode. That does not necessarily mean the place where the person is living at the time, but in order that a place may be

(1) Sub-nom. *Ex parte Rice Jones*, 1 L. M. & P. 357; 19 L. J. (M.C.) 151.

(2) 1 B. & B. 432.

(3) 1 Q. B. 66.

(4) 52 J. P. 344.

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properly described as his last place of abode, he must not have some other present abode, for that would make the former his last place of abode but one. It seems to me that this applies as much to a place of abode abroad as to one in England, and that if he has acquired a new place of abode abroad, the last English residence that he had ceases to be his last place of abode. As at present advised, I agree with the opinion expressed by Lord Selborne in *Berkley* v. *Thompson* (1), that in the absence of the putative father from England, the Act does not provide for service of the summons, especially looking at the provisions of s. 3, giving power to take proceedings within twelve months next after his return to England.

Order absolute for certiorari.

Solicitors for prosecutor: *Le Riche & Stephens, for E. Desquesnés, Salford.*

Solicitors for complainant: *Jaques & Co., for J. A. Foyster, Salford.*

A. M.

C. A. 1892 *March* 11.

[IN THE COURT OF APPEAL.]

IN RE NOYCE.

Lunatic—Vesting Order—Order for transfer of Stock—County Court—Jurisdiction—Value of Lunatic's Property under 200*l.*—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 132, 133.

A county court judge has no jurisdiction under s. 132 of the Lunacy Act, 1890, to make an order for the transfer of stock standing in the name of a lunatic:—

So *held*, by the Court of Appeal, affirming the decision of the Queen's Bench Division (ante, p. 97).

APPEAL against a judgment of a Divisional Court (Mathew and A. L. Smith, JJ.) (2), which set aside an order made by the judge of the Bow County Court.

The appellant was Frederick Edward Hilleary, the clerk to the guardians of the West Ham Union.

The order directed "that the secretary, deputy-secretary, or accountant-general for the time being of the Governor & Company of the Bank of England do transfer into the name of F. E.

(1) 10 App. Cas. 45. (2) [1892] 1 Q. B. 97.

Hilleary the sum of 157*l.* 0*s.* 2*d.*, 2*l.* 15*s.* per cent. Consolidated Annuities, standing in the books of the Governor & Company of the Bank of England in the name of Jane Noyce (a pauper lunatic), and also do pay to the said F. E. Hilleary the dividends now due, or to accrue due, on the annuities."

The question was, whether under the Lunacy Act, 1890, the county court judge had jurisdiction to make the order. The total value of the property of the lunatic was less than 200*l.*

The Divisional Court held that there was no jurisdiction.

Finlay, Q.C., and *Edward Morten*, for the appellant. The county court had jurisdiction under s. 132 (1) of the Lunacy Act, 1890. That section was intended to provide a cheap mode of dealing with the property of lunatics the total value of whose property was less than 200*l.* It may be that s. 133 applies to stock; but there is an alternative mode of proceeding given by s. 132. That section applies to all property of the lunatic, and

(1) By s. 132: "Where a reception order is made in the case of a lunatic the value of whose real and personal property is under 200*l.*, and no relative or friend of the lunatic is willing to undertake the management of such property, any judge of county courts having jurisdiction in the place from which the lunatic is sent, may, upon the application of the clerk of the guardians or a relieving officer of the union from which the lunatic is sent, authorize the clerk or relieving officer, or such other person as the judge by his order appoints, to take possession of, and sell and realize the real and personal property of the lunatic, and to exercise all the powers which could be exercised by the legal personal representative of the lunatic if he were dead; and the receipt of the person so authorized shall be a valid discharge to any person who pays any money or delivers any property of the lunatic to such person."

This section forms a distinct portion or chapter of the Act which is headed "Power of County Court Judge."

By s. 133: "Where any stock is standing in the name of or is vested in a lunatic beneficially entitled thereto, or is standing in the name of or vested in a committee of the estate of a lunatic so found by inquisition, in trust for the lunatic, or as part of his property, and the committee dies intestate, or himself becomes lunatic, or is out of the jurisdiction of the High Court, or it is uncertain whether the committee is living or dead, or he neglects or refuses to transfer the stock and to receive and pay over the dividends thereof as the judge in Lunacy directs, then the judge may order some fit person to transfer the stock to or into the name of a new committee, or into court, or otherwise, and also to receive and pay over the dividends thereof in such manner as the judge directs."

Sects. 133 to 143 (inclusive) form a distinct portion or chapter of the Act which is headed "Vesting Orders."

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as regards stock it is not necessary that a vesting order or an order appointing a person to transfer should be made. Sect. 132 says that the judge may authorize the clerk of the guardians "to exercise all the powers which could be exercised by the legal personal representative of the lunatic if he were dead." If the lunatic were dead her personal representative would, by virtue of s. 23 of the National Debt Act, 1870, without any vesting order, be able by registering the probate of her will, or the grant of administration to her estate, in the books of the Bank, to transfer the stock. Consequently, by virtue of s. 132 the appellant would, on registering the order of the county court, be able to transfer the stock, just as the personal representative of the lunatic could do on registering the probate or the grant of administration. The appellant is willing to have the terms of the order modified, so that it shall direct the Bank to allow him to transfer the stock, and he offered in the Court below to take the order in that form.

Latham, Q.C., and *Howard Wright*, for the Bank, were not called upon.

LORD ESHER, M.R. I think this matter is perfectly clear. The whole question is, whether certain stock belonging to a lunatic, who is beneficially interested in the stock, must be dealt with under s. 133 of the Act of 1890, or whether it can be dealt with under s. 132. If it can be dealt with under s. 132 it is only by virtue of general words, for there are no words in that section specifically applicable to stock. I think it would be very difficult to bring a transfer of stock within the words of s. 132 at all, when you look at what is required to be done or permitted to be done. But I will assume that the words are large enough to include stock. Then, if they are, it is only because they are general words which may include stock. But those words occur in s. 132, which constitutes a distinct part of the Act under the heading "Power of County Court Judge," and immediately afterwards there comes another heading, under which ss. 133 to 143 are included, and that heading is "Vesting Orders"; and under that heading "stock" (whatever the meaning of "stock" may be) is specifically dealt with by s. 133. In the

former section it is dealt with (if at all) by general words which have nothing to do with a vesting order. In the latter section there are specific words which expressly relate to a vesting order. When I say general words, I am assuming that this case is included in s. 132; but I make this assumption only for the purpose of my judgment, for I doubt very much whether the case can be brought within the words of s. 132. But, supposing it can, then, under the heading "Vesting Orders," s. 133 specifically deals with stock. It says: "Where any stock is standing in the name of or is vested in a lunatic beneficially entitled thereto," then "the judge may order some fit person to transfer the stock to or into the name of a new committee, or into court or otherwise." The word "judge" there cannot mean "county court judge," because s. 132 is under the heading of "Power of County Court Judge," and s. 133 is taken out of that heading, and is placed under a new heading, "Vesting Orders." Therefore, the word "judge" in s. 133 cannot mean the county court judge. Then what judge is meant? It must be one of the judges of the Supreme Court who deal with matters in Lunacy, as they have always dealt with them. Sect. 133 deals with "stock" specifically. You must deal with stock under the specific enactment relating to it, and you cannot take stock out of that specific enactment in order to place it under a general enactment which is really dealing with other matters. I think, therefore, that the judgment of the Divisional Court was right, and that this appeal must be dismissed.

FRY, L.J. I am of the same opinion. It appears to me that s. 133 is intended to deal with stock in all cases. It is a specific enactment with regard to that description of property, and, therefore, the general words which are found in s. 132 do not include stock since they are inconsistent with the mode of dealing with it which is provided by s. 133. That is the scope of the Act. And it must be borne in mind that there is a necessity for dealing in a particular manner with property of this description, because the books of the Bank of England, or of any company, in which stock is standing, must be properly kept, and the bank or the company may reasonably require, as indeed

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the Bank of England has always required, that the instrument effecting the transfer shall be of a specific description. That is my view of the Act; and therefore, although there are in s. 132 general words which might, under some circumstances, extend to stock, yet in this case they do not extend to stock. I think, therefore, that the decision of the Court below was right.

LOPES, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors: *Hilleary; Freshfields & Williams.*

W. L. C.

1892 *Jan.* 29.

IN RE FRANKS. EX PARTE GITTINS.

Bankruptcy—Examination of Witnesses—Action by Trustee in Bankruptcy—Right to examine Party to Action—Discretion of Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 27.

Where an action has been commenced by the trustee in bankruptcy against a person who is a stranger to the bankruptcy with respect to property alleged to be part of the bankrupt's estate, the Court will not, in the absence of special circumstances, allow the trustee to examine such person under s. 27 of the Bankruptcy Act, 1883, with the view of obtaining information in relation to the matter in dispute beyond such discovery as can be obtained under the ordinary procedure of the High Court.

THIS was an application by the trustee in bankruptcy under s. 27 of the Bankruptcy Act, 1883, to examine one Campbell touching the affairs of the bankrupt.

In May, 1891, A. Franks was adjudicated bankrupt on his own petition presented in the previous April, and the official receiver became the trustee.

On June 12, 1891, the bankrupt died.

On March 24, 1891, the bankrupt had assigned a policy of assurance on his own life to Campbell for value. In October, Campbell commenced an action against the insurance company to obtain payment of the policy moneys, which were claimed by the trustee in bankruptcy as part of the bankrupt's estate.

On November 2, the insurance company took out an interpleader summons, and an issue was directed to try the question

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whether the trustee or Campbell was entitled to the policy moneys.

On November 16, the trustee took out a summons under s. 27 of the Bankruptcy Act, 1883, for the examination of Campbell touching the bankrupt's affairs. Campbell attended before the registrar; but, on counsel for the trustee declining to limit the examination to matters outside the interpleader issue, he refused to be examined. The summons was then referred to the judge.

Muir Mackenzie, for the trustee. The pendency of an action, or of an interpleader issue, is not a sufficient reason for staying the examination, but only for directing that the depositions shall not be used in the pending proceedings. It is important that the trustee should know the material facts under which the policy was assigned to Campbell. Under s. 115 of the Companies Act, 1862, which is very similar in its terms to s. 27 of the Bankruptcy Act, 1883, it has been held that the pendency of an action is not a bar to the examination of a party.

[VAUGHAN WILLIAMS, J. The matter is entirely in the discretion of the Court. The question is whether the Court thinks it desirable that the examination should proceed.]

In *Massey* v. *Allen* (1) and *In re Metropolitan Brush Electric Light and Power Co., Limited* (2), both cases under s. 115 of the Companies Act, 1862, it was held that the examination should proceed. Here it is expedient that the trustee should ascertain by this examination whether it will be prudent for him to proceed with this litigation or not.

J. Walton, for Campbell. No doubt this matter is in the discretion of the Court; but the trustee ought not to be allowed to get discovery in this manner. As a general rule, the Court will not interfere with the usual procedure as to discovery in an action: *In re North Australian Territory Co., Limited.* (3)

Muir Mackenzie, in reply.

VAUGHAN WILLIAMS, J. I think it is better that this examination should be postponed. I should be very loth to say that the mere fact that there is an action pending between the

(1) 9 Ch. D. 164. (2) 51 L. T. (N.S.) 817.
(3) 45 Ch. D. 87.

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Vaughan Williams, J.

trustee and a third party justifies the trustee in at once resorting to an examination under s. 27 of the Bankruptcy Act, 1883. I should not like it to be supposed that the powers under that section are to be treated as a mere step in the action; but at the same time I think the trustee is entitled to reasonable information, and it may be that circumstances hereafter may induce me to direct that this examination shall proceed. I wish, however, to avoid permitting the trustee to have anything like a dress rehearsal of the cross-examination in the action. It will probably facilitate matters and save expense if the trustee will furnish Mr. Campbell with a written statement in the action of the admissions of fact that he desires to obtain from him. If the trustee's requisitions are reasonable and are fairly answered, that will probably conclude the matter. But if the trustee's requisitions are objected to, or the answers are deemed insufficient or unsatisfactory, I will then decide whether this examination shall go on or not.

Solicitor for trustee: *W. Murton.*

Solicitors for Mr. Campbell: *Kennedy, Hughes, & Kennedy.*

H. L. F.

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April 4.

THE QUEEN *v.* NEWTON AND OTHERS.

Justices—Practice—Prosecution for keeping Brothel—Summary Proceedings—Warrant for Arrest of Person accused—25 *Geo.* 2, *c.* 36, *ss.* 5, 6, 7—58 *Geo.* 3, *c.* 70, *s.* 7—*Criminal Law Amendment Act*, 1885 (48 *&* 49 *Vict. c.* 69), *s.* 13.

The provision contained in 25 Geo. 2, c. 36, s. 6, that a warrant shall be issued for the arrest of a person accused, on notice given by two inhabitants to a constable under that Act, of keeping a disorderly house, applies to a prosecution by summary proceedings, under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13, of a person accused of keeping a brothel, and, therefore, in such a case, if an application for a warrant is made in accordance with 25 Geo. 2, c. 36, a magistrate is bound to grant a warrant.

AN order nisi had been granted calling upon Mr. Newton, one of the Metropolitan police magistrates, and the persons whose arrest was applied for, to shew cause why the magistrate should not make out his warrant to apprehend and bring before him certain persons who were accused of keeping a brothel.

The application for the warrant was made, in accordance with the provisions of 25 Geo. 2, c. 36, ss. 5, 6, 7 (1), on notice in

(1) By 25 Geo. 2, c. 36, s. 5: "In order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses, and other disorderly houses, be it enacted, that if any two inhabitants of any parish or place, paying scot and bearing lot therein, do give notice in writing to any constable (or other peace officer of the like nature when there is no constable) of such parish or place, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable or such officer as aforesaid so receiving such notice shall forthwith go with such inhabitants to one of His Majesty's justices of the peace of the county, city, riding, division, or liberty in which such parish or place does lie, and shall, upon such inhabitants making oath before such justice that they do believe the contents of such notice to be true, and entering into a recognizance in the penal sum of twenty pounds each to give or produce material evidence against such person for such offence, enter into a recognizance in the penal sum of thirty pounds to prosecute with effect such person for such offence, at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county in which such parish or place does lie, as to the said justices shall seem meet."

After providing for the expenses of the prosecution, the section proceeds, "and in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of ten pounds to each of such inhabitants," and a penalty is provided for neglect or refusal to pay such sum.

Sect. 6: "Provided always, that upon such constable or other officer entering into such recognizance to prosecute as aforesaid, the said justice of the peace shall forthwith make out his warrant to bring the person so accused of keeping a bawdy-house, gaming-house, or other disorderly house, before him, and shall bind him or her over to appear at such general or quarter sessions or assizes, there to answer to such bill of indictment as shall be found against him or her for such offence," with power to take security for good behaviour in the meantime.

Sect. 7 imposes a penalty on the constable for neglect in prosecuting.

58 Geo. 3, c. 70, s. 7, after reciting a portion of the provisions of 25 Geo. 2, c. 36, s. 5, enacts: "That a copy of the notice which shall be given to such constable, shall also be served on or left at the places of abode of the overseers of the poor of such parish or place, or one of them, and such overseers or overseer of the poor shall be summoned, or have reasonable notice to attend before such justice of the peace before whom such constable shall have notice to attend; and if such overseers or overseer of the poor shall then and there enter into such recognizance to prosecute such offender as the constable is in and by the said Act required to enter into, then it shall not be necessary for, nor shall such constable be required, to enter into such recognizance; but if such overseers or overseer of the poor shall neglect to attend such justice on having such notice, or shall attend, and shall decline or refuse to enter into such recognizance to prosecute, then such constable shall enter into the same, and shall prosecute, and shall be entitled to his expenses, to be

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writing given by two inhabitants to a constable. The magistrate was of opinion that the provisions of the above-named Act as to the granting of warrants did not apply to the case of summary proceedings for the suppression of brothels under s. 13 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict.

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allowed as in and by the said Act is directed."

By 11 & 12 Vict. c. 43, s. 2: The Summary Jurisdiction Act, 1848 (commonly known as Jervis's Act), upon information being laid before a justice for an offence, "the justice or justices before whom such information shall have been laid, may, if he or they shall think fit, upon oath or affirmation being made before him or them, substantiating the matter of such information to his or their satisfaction . . . . issue, in the first instance, his or their warrant for apprehending the person against whom such information shall have been so laid, and bringing him before the same justice or justices . . . . to answer to the said information, and to be further dealt with according to law."

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 54: "This Act shall be construed as one with the Summary Jurisdiction Act, 1848, so far as is consistent with the tenour of such Acts respectively."

By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13: "Any person who—

"(1.) keeps or manages or acts or assists in the management of a brothel, or

"(2.) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution, or

"(3.) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel,

shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable—

"(1.) to a penalty not exceeding twenty pounds, or, in the discretion of the Court, to imprisonment for any term not exceeding three months, with or without hard labour" (and on a second or subsequent conviction to further penalties). . . .

"Any person on being summarily convicted in pursuance of this section may appeal to a court of general or quarter sessions against such conviction.

"The enactments for encouraging prosecutions of disorderly houses contained in ss. 5, 6, and 7, of 25 Geo. 2, c. 36, as amended by s. 7 of 58 Geo. 3, c. 70, shall, with the necessary modifications, be deemed to apply to prosecutions under this section, and the said enactments shall, for the purposes of this section, be construed as if the prosecution in such enactments mentioned included summary proceedings under this section as well as a prosecution on indictment."

c. 69), and that in such a case if a warrant were applied for, the application ought to be made on an information laid before him under 11 & 12 Vict. c. 43, s. 2, and refused to grant a warrant.

The Solicitor General (*Sir Edward Clarke, Q.C.*), and *Daldy*, for the magistrate shewed cause. The magistrate was right in refusing to issue a warrant. It is true that 25 Geo. 2, c. 36, s. 6, directs the issue of a warrant; but that provision refers only to prosecutions by indictment; s. 13 of the Criminal Law Amendment Act, 1885, which gives a remedy by summary proceedings against persons keeping brothels, applies the provisions of 25 Geo. 2, c. 36, ss. 5, 6, 7, and 58 Geo. 3, c. 70, s. 7, to prosecutions under that section, but it applies them "with the necessary modifications," and one of such necessary modifications is that in the case of proceedings under the Summary Jurisdiction Acts, the right to a warrant, given by 25 Geo. 2, c. 36, s. 6, in the case of prosecutions by indictment, is excluded, for all the provisions of the Summary Jurisdiction Acts are applicable, and by 11 & 12 Vict. c. 43, s. 2, the application for a warrant in the first instance must be made upon information. A warrant may be necessary in the case of a prosecution by indictment in order to compel the attendance of the accused, but this is not so in the case of summary proceedings, for, by 11 & 12 Vict. c. 43, s. 2, if a person summoned fail to appear, the magistrate may proceed ex parte and hear the charge.

Avory, in support of the rule. The Criminal Law Amendment Act, 1885, gives a new remedy by summary proceedings, but the remedy by indictment is not taken away. The magistrate is not bound to deal with the case summarily. If he thinks the charge too serious to be dealt with summarily, he has a discretion to commit for trial. There is, therefore, no ground for the suggested distinction between summary proceedings and prosecution by indictment. The effect of s. 13 of the Criminal Law Amendment Act, 1885, is that all references to prosecutions in the Acts of Geo. 2 and Geo. 3, applied by that section must now be read as if the word "prosecution" included summary proceedings. That this is the correct interpretation is clear

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from the decision in *Kirwin* v. *Hines* (1), and from the express terms of the last sentence of s. 13.

[He was stopped.]

A. L. SMITH, J. In this case an order has been granted calling upon Mr. Newton, a Metropolitan police magistrate, to shew cause why he should not issue his warrant for the apprehension of certain persons whom the applicants desire to prosecute for the offence of keeping a brothel. The point taken by the Solicitor General in shewing cause on behalf of the magistrate is a formidable point on the face of it, but, on reading the whole of s. 13 of the Criminal Law Amendment Act, 1885, I have come to the conclusion that the case is as plain as it could be. The old Act, 25 Geo. 2, c. 36, was passed in order to induce the inhabitants to prosecute keepers of disorderly houses. Sects. 5, 6, and 7 of that Act are intended to provide for the effective conduct of such prosecutions, and to secure payment of the expenses of the prosecutions, and of rewards where convictions are obtained. These sections provide that any two inhabitants may give notice in writing to a constable of any person keeping a disorderly house, and then go before a magistrate with the constable, and produce the notice which has been given to the constable, and swear that they believe the contents of the notice to be true, and then the magistrate is to issue his warrant for the apprehension of the person accused, and the two inhabitants are to be bound over to produce evidence, and the constable is to be bound over to prosecute. The later Act, 58 Geo. 3, c. 70, s. 7, only empowers the overseers on receiving notice to go on with the prosecution if they think fit, and if they do not the constable is to prosecute. The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13, provides that the suppression of brothels may be carried out by means of summary proceedings, but it leaves the old procedure by indictment still available. There is also an appeal given to quarter sessions against any summary conviction under this section. The Solicitor General contends that because it is proposed in the present case to take summary proceedings, therefore all the procedure which is applicable to summary

(1) 54 L. T. (N.S.) 610.

jurisdiction must apply, and, therefore, the provisions of Jervis's Act are applicable here. Sect. 2 of Jervis's Act (11 & 12 Vict. c. 43) requires that before the warrant is issued an information shall have been laid before the magistrate, and the matter of such information substantiated by oath or affirmation. If that provision were applicable it would follow that the magistrate in the present case might decline to grant a warrant until the case was plainly put before him by information. Mr. Avory on the other hand contends that s. 13 of the Criminal Law Amendment Act, 1885, only gives a remedy by summary proceedings in addition to the remedy by indictment which already existed, and that the provisions of the Acts of Geo. 2 and Geo. 3, which apply to the remedy by indictment, are by the Criminal Law Amendment Act, 1885, made applicable also to the remedy by summary proceedings. I am of opinion that the words of s. 13 bear out that contention. That section applies the provisions of the older Acts, with the necessary modifications, to summary prosecutions, and then goes on to provide as follows: "and the said enactments shall, for the purposes of this section, be construed as if the prosecution in such enactments mentioned included summary proceedings under this section as well as a prosecution on indictment." The effect of these words is to read in to ss. 5, 6, and 7 of 25 Geo. 2, c. 36, a reference to proceedings by way of summary prosecution, so as to make the provisions contained in those sections applicable to summary prosecutions as well as to prosecutions by indictment.

I am therefore of opinion that the magistrate in this case is bound to issue a warrant, and that the order ought to be made absolute.

LAWRANCE, J. I am entirely of the same opinion. I look upon the last words of s. 13 of the Criminal Law Amendment Act, 1885, as conclusive.

Order absolute.

Solicitors for the prosecution: *Ayton Safford & Kent.*

Solicitors for the magistrate: *Hare & Co., agents for the Solicitor to the Treasury.*

P. B. H.

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Nov. 11.
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Feb. 3.

CHURCHWARDENS AND OVERSEERS OF WEST HAM, APPELLANTS; FOURTH CITY MUTUAL BUILDING SOCIETY AND ANOTHER, RESPONDENTS.

Poor-rate—Rating of Owners instead of Occupiers—Sturges Bourne's Act (59 *Geo.* 3, *c.* 12), *s.* 19—*Repeal of by Implication—Parochial Assessment Act*, 1836 (6 *&* 7 *Wm.* 4, *c.* 96)—*Union Assessment Committee Act*, 1862 (25 *&* 26 *Vict. c.* 103)—*Poor Rate Assessment and Collection Act*, 1869 (32 *&* 33 *Vict. c.* 41).

By s. 19 of 59 Geo. 3, c. 12, the churchwardens and overseers of the poor were enabled to assess to the poor-rate the owner instead of the occupier of premises let at a rent not exceeding 20*l.* nor less than 6*l.* a year, basing the rate upon the actual rental of the tenement less a reasonable deduction not exceeding one-half the rent. By the Parochial Assessment Act, 1836, passed to establish a uniform mode of rating for the relief of the poor in England and Wales, the basis of rating was fixed and defined to be upon the net annual value of the hereditament rated; and by the Union Assessment Committee Act, 1862, passed in order to secure a uniform and correct valuation of parishes in unions in England, assessment committees were appointed to revise the valuation lists prepared by the overseers, and no rate was to be allowed unless made according to such list when approved by the committee. By the Poor Rate Assessment and Collection Act, 1869, s. 3, owners of property in England and Wales of a rateable value not exceeding certain prescribed amounts in different localities were enabled to agree with the overseers to pay the poor-rates, less a commission not exceeding 25 per cent. on the amount thereof, and by s. 4, the vestry might order the owner to be rated instead of the occupier; and, if they did so order, a deduction of 15 per cent. on the amount of the rate was to be allowed:—

Semble, that s. 19 of 59 Geo. 3, c. 12, was impliedly repealed by virtue of the provisions of the subsequent Acts altering the basis upon which, and the persons by whom, the rate was to have been made upon the owner under that section; and that owners can now be rated to the relief of the poor, instead of occupiers, only under the provisions of the Poor Rate Assessment and Collection Act, 1869.

CASE stated by the stipendiary magistrate for the borough of West Ham under the Summary Jurisdiction Act, 1879.

On April 23, 1846, the vestry of the parish of West Ham, at a meeting duly convened, passed a resolution as follows: "That this vestry resolve and direct, under the authority of 59 Geo. 3, c. 12, that the churchwardens and overseers of the poor of this parish assess the owner or owners of all houses, apartments, or dwellings, and curtilages thereof, to the rates for the relief of the

poor, instead of the actual occupier or occupiers, whenever the said houses, apartments, and curtilages thereof shall be let at any rent not exceeding 20*l.* nor less than 6*l.* by the year for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months; and further, this vestry resolves and directs that the owner or owners of the before-described rateable property to the poor-rate shall be assessed upon one-half of the actual rent at which the same shall be let." This resolution was never rescinded.

The parish was created a municipal borough on July 9, 1886, and by the West Ham Corporation Improvement Act, 1888, it was enacted that s. 3 of the Poor Rate Assessment and Collection Act, 1869, should be in force in that parish as if it were situate in the metropolis.

On October 3, 1890, the vestry of the parish, at a meeting duly convened and held for the purpose of considering and determining whether it was expedient that the owners of premises whose rateable value did not exceed 20*l.* should be rated to the poor-rate, instead of the occupiers, by virtue of the Poor Rate Assessment Act, 1869, and that all resolutions and orders therebefore passed or made by the vestry in relation to the rating of owners instead of occupiers should be rescinded and revoked, resolved that it was not so expedient.

By poor-rates made in November, 1889, and April and October, 1890, certain houses, apartments, and dwellings, of which the respondent society were the owners, let at rents not exceeding 20*l.* nor less than 6*l.* a year for less terms than three years, or on agreements by which the rents were payable at shorter periods than three months, were rated according to their respective annual rateable values, appearing in the valuation list then in force in the parish. The total amount of such rates was 97*l.* 13*s.* 8*d.* The respondent society, having refused to pay this amount, were summoned before the magistrate to shew cause why they should not pay the same.

The gross estimated rentals and rateable values of the respondents' premises appearing in the rates and valuation lists were ascertained according to a scale furnished to the churchwardens

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and overseers by the assessment committee of the West Ham Union.

The appellants contended that the respondents were liable to be rated in respect of their premises by virtue of s. 19 of 59 Geo. 3, c. 12, and that they were duly rated in accordance therewith. The respondents contended that s. 19 of that Act was superseded by the provisions of the Parochial Assessment Act, 1836 (6 & 7 Wm. 4, c. 96), the Small Tenements Act, 1850 (13 & 14 Vict. c. 99), the Union Assessment Acts, 1862 (25 & 26 Vict. c. 103), and 1864 (27 & 28 Vict. c. 39), and the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), and therefore was no longer in force in the parish; that, if it was in force, the appellants had not rated the respondents according to its provisions; that the rate did not shew on its face that the respondents were rated as owners; that the rate was in reality a rate upon the occupiers made in the ordinary way upon the rateable value ascertained by the valuation list for the time being, and not a rate according to the actual rents of the premises, after making a reasonable deduction from such rent as required by the Act.

The magistrate decided that s. 19 of 59 Geo. 3, c. 12, was suspended and impliedly repealed by the subsequent Acts; and that, even if it were still in force, it appeared on the face of the rates that the appellants had not acted under it in making the rates, and he dismissed the summons, and refused to issue a warrant of distress.

Lumley Smith, Q.C., and *Alexander Glen*, for the appellants.

Macmorran, for the respondents.

The arguments sufficiently appear from the judgment. The following cases were cited: *Overseers of West Ham* v. *Iles* (1); *Reg.* v. *Fordham* (2); *Overseers of Sunderland* v. *Guardians of Sunderland.* (3)

Cur. adv. vult.

Feb. 3. The judgment of the Court (Mathew and A. L. Smith, JJ.) was delivered by

A. L. SMITH, J. This is an appeal from the decision of Mr. Baggallay, the magistrate sitting at West Ham, who refused to

(1) 8 App. Cas. 386. (2) 11 A. & E. 73. (3) 34 L. J. (M.C.) 121.

grant to the appellants a distress warrant to levy upon the respondents, who are owners, but not occupiers, of premises in West Ham, the amount of a poor-rate assessed upon them, upon the ground, firstly, that s. 19 of Sturges Bourne's Act, under which the appellants sought to rate the respondents as owners, was repealed; and secondly, if it were not and the rate were made under Sturges Bourne's Act, it was invalid because it did not provide for the allowance to the owner as enacted by that Act. The first question is whether s. 19 of Sturges Bourne's Act (59 Geo. 3, c. 12), passed in 1819, has been repealed by the statutes which have since been passed on the subject of the assessment to poor-rates. The 19th section of this Act enacted that, where houses were let at a rent not exceeding 20*l.* nor less than 6*l.* by the year, the inhabitants in any parish in vestry assembled might resolve that the owners instead of the actual occupiers should be assessed to the poor-rate; in which case the churchwardens and overseers of such parish were then to assess such owners according to the actual rents at which such houses should be let after making a reasonable deduction from such rent not exceeding one-half of the same. In the year 1836 the Parochial Assessment Act was passed (6 & 7 Wm. 4, c. 96), to establish one uniform mode of rating for the relief of the poor, and by this Act the basis of rating throughout England and Wales was fixed and defined to be upon the net annual value of the hereditament rated. It was by this Act provided that "nothing therein should be construed to alter or affect the principles or different relative liabilities (if any) according to which different kinds of hereditaments are now by law rateable," and it was further enacted that the form of the rate should set forth, amongst other things, the "gross estimated rental" as well as "the rateable value" of each hereditament. In 1850 the Small Tenements Act was passed (13 & 14 Vict. c. 99), which empowered the vestry of any parish to order that the owners of tenements, the yearly rateable value whereof should not exceed 6*l.*, should be rated instead of the occupier. The provisions of this Act may in some cases have overlapped the provisions of Sturges Bourne's Act, for houses of a rental over 6*l.* might well have come within its operation. In the year 1858 an Act amending the Municipal

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Franchise was passed (21 & 22 Vict. c. 43). This Act expressly recognised the then existence of s. 19 of Sturges Bourne's Act, and enacted that, though the owners paid the rates in some cases under that Act, the occupiers nevertheless were entitled to the municipal franchise. This appears to us to be a recognition by the legislature that, up to this date, s. 19 of the Act of 1819 was unrepealed, so far at any rate as it related to owners instead of occupiers paying the rates levied upon certain hereditaments. In the year 1862 the Union Assessment Committee Act (25 & 26 Vict. c. 103), was passed, whereby, in order to secure uniform and correct valuations of parishes in unions in England, assessment committees were appointed who were to revise the valuation lists prepared by the overseers, and, when approved by the committee, no rate was to be allowed unless made according to such list. In this Act the power of owners to compound was preserved, and there was also excepted (s. 36) from the provisions of the Act any property which under any local Act or otherwise was entitled to be rated upon any fixed amount or according to any special or exceptional principle of valuation. So matters stood prior to the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102). It seems to us that, down to this date, it cannot be said that s. 19 of Sturges Bourne's Act was wholly repealed. The test of whether there has been a repeal by implication by subsequent legislation is this : Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together? In which case "Leges posteriores contrarias abrogant." It appears to us that the Acts of 1836 and 1862 determined the basis upon which, and the persons by whom, rates should thereafter be made, and so far altered s. 19 of Sturges Bourne's Act. These Acts did not deal with the persons who were to pay the rates when so ascertained. Sect. 7 of the Representation of the People Act, 1867, enacted that "where the owner is rated at the time of the passing of this Act to the poor-rate in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough returning a member or members to serve in Parliament, instead of the occupier, his liability to be rated in any future poor-rate shall cease, and the following enactments shall take effect with respect

to ratings in all boroughs, i.e., boroughs returning a member or members to serve in Parliament: (1.) After the passing of this Act no owner of any dwelling-house or tenement situated in a parish either wholly or partly within a borough (i.e., returning a member or members to serve in Parliament) shall be rated to the poor-rate instead of the occupier" except (to state it shortly) the house is wholly let out in lodgings. It was said by Mr. Macmorran, for the respondents, that this section repealed s. 19 of Sturges Bourne's Act, for, said he, Sturges Bourne's Act enacted that the owner should be rated, and this section (s. 7) enacted that he should not. In our judgment, s. 7 of the Act of 1867 did not have this effect as regards owners in West Ham; for it appears to us that this section is made to apply only to owners rated in respect of premises situated in a parliamentary borough at the date of the passing of that Act, i.e., on August 15, 1867. The premises in question in this case at West Ham at that date were not situated in a parliamentary borough, for West Ham never became such a borough till eighteen years afterwards, viz., in 1885; and consequently this 7th section of the Act of 1867 has no application to owners of property in West Ham, and does not repeal the 19th section of Sturges Bourne's Act as regards its application to them. We are of opinion that as regards the rating of premises then (i.e., in 1867) in a parliamentary borough Sturges Bourne's Act was repealed. In the year 1869, the legislature passed an Act (32 & 33 Vict. c. 41) to amend the law relating to the collection of poor-rates assessed upon occupiers of hereditaments held for short terms. The Act expressly repealed the Small Tenements Act of 1850 (13 & 14 Vict. c. 99), and so much of any local statute as related to the rating of owners instead of occupiers to the poor-rate. Sturges Bourne's Act was not a local statute, and certainly was not in express terms then repealed; but the question is, Did the Act of 1869, coupled with what had gone before, by implication repeal the 19th section of the Act of 1819? We have not to decide what, prior to the Act of 1869, would have been the rights of the vestry of West Ham, assuming they had then decided to assess to the poor-rate the owner instead of the occupier of the premises of the yearly rental of between 20*l.* and 6*l.*; but what we

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have to decide is what their rights are in the years 1890 and 1891. The Act of 1869 applies to all property situated in England and Wales. By s. 3, owners of property of the rateable value not exceeding 20*l.* in the metropolis, or 13*l.* in Liverpool, or 10*l.* in Manchester or Birmingham, or 8*l.* elsewhere, are enabled to agree with the overseers to pay the poor-rates under discount not exceeding 25 per cent. By s. 4, the vestry are enabled to order that the owners of such premises shall be rated to the poor-rate instead of the occupiers; but, if the vestry did so order, then a deduction of 15 per cent. from the amount of the rate in favour of the owner, i.e., 15 per cent. from the rateable value, was to be allowed. Then, how do matters stand? By s. 19 of the Act of 1819 (Sturges Bourne's Act), the vestry were enabled to assess to the poor-rate the owner, instead of the occupier, of premises let at a rent not exceeding 20*l.* nor less than 6*l.*, but in that case must base the rate upon the actual rental of the tenement, less a reasonable deduction not exceeding half the rent. But the basis upon which, and the person by whom, this rate was to have been made, appear to us to have been abolished by the subsequent legislation in 1836 and 1862. In the year 1867, the legislature repealed the 19th section of the Act of 1819, so far as it related to parliamentary boroughs at that date; and by the Act of 1869 enacted, that when thereafter in England and Wales, the owner instead of the occupier of premises of the rateable value therein prescribed, i.e., 20*l.* in the metropolis, 12*l.* in Liverpool, 10*l.* in Manchester and Birmingham, and 8*l.* elsewhere, was ordered by the vestry to be assessed to the poor-rate, the rate was to be based upon rateable value, and an allowance should be made of 15 per cent. off that amount to the owner. We incline to the opinion that, inasmuch as it is impossible now to base the rate upon actual rent less reasonable deductions, and inasmuch as the overseers can no longer decide what such deductions should be, and a new scheme of assessing owners was expressly provided by the Act of 1869, allowing a special deduction of 15 per cent. off the rateable value to the owner, at the present time the provisions of Sturges Bourne's Act cannot be resorted to, and that the statute has been repealed by the subsequent legislation, and that, if it is now sought to rate the

owner instead of the occupier, the Act of 1869 is the only Act which can be applied to for that purpose. As to the second point, it is obvious that whether a rate upon an owner be made, either under s. 19 of the Act of 1819, or under the Act of 1869, a special allowance in either case has to be made to the owner. The rate in question in this case, in our judgment, is clearly made as if an occupier was being rated and not an owner, and no special allowance has been made therein to the owner; and so, whichever way it is to be taken, the rate is bad. If made under Sturges Bourne's Act, no fair allowance has been made by the overseers from the rent paid, or, if made under the Act of 1869, there has been no 15 per cent. allowed to the owner off the rateable value. For these reasons we are of opinion that the decision of the magistrate was correct, and that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *Banes.*

Solicitors for respondents: *Fowkes & Son.*

W. A.

FOURTH CITY MUTUAL BUILDING SOCIETY, APPELLANTS; CHURCHWARDENS AND OVERSEERS OF EAST HAM, RESPONDENTS.

1891 *Nov.* 17.

1892 *Feb.* 3.

Justices—Jurisdiction—Court of Summary Jurisdiction—Recovery of Poor-rates—Power to state Case—Summary Jurisdiction Act, 1884 (47 & 48 *Vict. c.* 43), *ss.* 7, 10—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 13, *sub-s.* 11.

Under s. 13, sub-s. 11, of the Interpretation Act, 1889, which repeals and re-enacts s. 7 of the Summary Jurisdiction Act, 1884, justices sitting to hear an application for the issue of a distress warrant for the non-payment of poor-rates are not necessarily exercising a ministerial duty, but are authorized to inquire into the validity of the objections taken by the party summoned, and to state a case for the opinion of the High Court.

CASE stated by justices.

The appellants, the Fourth City Mutual Building Society, had been summoned before the justices for non-payment of poor-rates, and the facts appearing in evidence, and the points raised as to the mode of rating owners instead of occupiers, were similar to those in the *West Ham Case.* (1)

The justices were, however, of opinion that, the rate being good

(1) Ante, p. 654.

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upon the face of it, they had no jurisdiction to consider the questions raised by the appellants, or to go behind the rate, and they accordingly ordered a distress warrant to issue, but stated the present case, in which the question of law for the opinion of the Court was whether the justices had jurisdiction to consider the points raised by the appellants, or whether such points were not grounds for appeal to quarter sessions.

Macmorran, for the appellants. The justices were not exercising purely ministerial functions, but were acting as a court of summary jurisdiction; they had, therefore, jurisdiction to inquire into the questions raised on behalf of the appellants, and an appeal by way of special case lies from their decision to the High Court. By s. 7 of the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), the definition of a court of summary jurisdiction given in s. 50 of the Summary Jurisdiction Act, 1879, was extended to include justices "whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his or their commission, or by the common law." This section was repealed; but the definition contained in it was re-enacted by s. 13, sub-s. 11, of the Interpretation Act, 1889. It is true that s. 10 of the Summary Jurisdiction Act, 1884, provided that nothing in that Act should alter the procedure for the recovery of, or any remedy for, the non-payment of any poor-rate; but that section merely preserved the old right to take proceedings by way of application for a distress warrant, and did not override or qualify the wide language of s. 7, nor does it qualify s. 13, sub-s. 11, of the Interpretation Act. The effect of that section has already been decided in *Reg.* v. *Lord Mayor of London*. (1) If the function of the justices is purely ministerial, there can be nothing to prevent them from issuing a distress warrant for the recovery of rates, such as church rates, the payment of which cannot be enforced by compulsion of law.

Douglas Walker, Q.C., and *Muir*, (*Forrest Fulton*, with them), for the respondents. The justices were not sitting as a court of summary jurisdiction. In order to be a court of summary jurisdiction, the justice must be acting in the exercise of a judicial

(1) 57 L. T. (N.S.) 491.

discretion; while in issuing a distress warrant their jurisdiction is purely ministerial. The mere fact that the magistrates have to inquire whether certain statutory provisions have been complied with does not amount to an exercise by them of a judicial discretion.

Cur. adv. vult.

Feb. 3. The judgment of the Court (Mathew and A. L. Smith, JJ.) was read by

A. L. SMITH, J. In this case, wherein the same points are presented as in the case in which judgment has just been given, the justices desire to know whether they had jurisdiction to consider the question raised by the appellants.

We are of opinion that the justices when called upon to issue a distress warrant have jurisdiction to inquire whether there existed any power whereby an owner can be rated to the poor instead of the occupier, and that the question can now be determined in this court upon a case stated: see 52 & 53 Vict. c. 63, s. 13, sub-s. 11; *Reg.* v. *Lord Mayor of London.* (1)

The case put in argument appears to us conclusive upon this point. Suppose a distress warrant now applied for to levy a church rate. Ought the justices to issue the warrant? We say, clearly not. Why? Because they would know, or ought to know, that no statute existed under which payment of the rate could be enforced; and so in the present case they ought to have inquired whether any statute existed under which the rate could be levied upon an owner instead of an occupier, and whether, if so, the provisions of the Act had been complied with. In our judgment, for the reasons given in the case of *Churchwardens and Overseers of West Ham* v. *Fourth City Mutual Building and Investment Society* (2), the rate made upon the appellants, the owners of premises in East Ham, cannot be supported, and this appeal must be allowed with costs against the respondents, and the case remitted to the justices.

Appeal allowed.

Solicitors for appellants: *Fowkes & Son.*

Solicitors for respondents: *Wilson & Son.*

(1) 57 L. T. (N.S.) 491.

(2) Ante, p. 654.

W. J. B.

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Feb. 16.

THE QUEEN *v.* JUSTICES OF LONDON. Ex parte LAMBERT.

Justices—Practice—Summary Trial with Consent — Conviction — Appeal to Quarter Sessions—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *ss.* 12, 19.

Where a person charged before a court of summary jurisdiction with an indictable offence under s. 12 of the Summary Jurisdiction Act, 1879, consents to be dealt with summarily and is thereupon convicted, he has no right of appeal to quarter sessions under s. 19, which gives a right of appeal from convictions by a court of summary jurisdiction "in pursuance of any Act whether past or future."

Rule nisi for a mandamus, granted at the instance of G. Lambert, calling upon the justices of London in quarter sessions to shew cause why they should not hear and determine the appeal of the applicant from a conviction for larceny by a metropolitan police magistrate.

The applicant, G. Lambert, was charged before a metropolitan police magistrate with larceny of property not exceeding 40*s.* in value, and, on being asked whether he desired to be tried by a jury, or would consent to the case being dealt with summarily, he consented to be dealt with summarily, in pursuance of the provisions of s. 12 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). The magistrate thereupon convicted him, and sentenced him to three months imprisonment.

The applicant appealed to quarter sessions, when the objection was raised that there was no right of appeal from a summary conviction under s. 12 of the Summary Jurisdiction Act, 1879. (1)

(1) The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) provides:—

Sect. 12: "Where a person who is an adult is charged before a court of summary jurisdiction with any indictable offence specified in the second column of the First Schedule to this Act, the Court, if they think it expedient so to do, having regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case, and if the person charged with the offence, when informed by the Court of his right to be tried by a jury, consents to be dealt with summarily, may deal summarily with the offence, and adjudge such person, if found guilty of the offence, to be imprisoned, with or without hard labour, for any term not exceeding three months, or to pay a fine not exceeding twenty pounds.

"For the purpose of a proceeding under this section, the Court, at any time during the hearing of the case at which they become satisfied by the evidence that it is expedient to deal with the case summarily, shall cause

The Court sustained the objection, and refused to entertain the appeal, whereupon the applicant obtained this rule.

Macmorran, shewed cause. There is no right of appeal under s. 19 of the Summary Jurisdiction Act, 1879, from convictions under s. 12 of the Act, as appears clearly from its provisions. Sect. 19 provides that there shall be an appeal from a conviction "in pursuance of any Act, whether past or future." In this case the conviction was in pursuance of the Summary Jurisdiction Act, 1879, itself, and therefore was not under "any Act, whether past or future." The Act of 1879 carefully distinguishes between past Acts, future Acts, and "this Act," and always expressly mentions "this Act" when it intends to include it. In s. 5, "a court of summary jurisdiction under this Act, or under any other Act, whether past or future," is spoken of; in s. 20, "a case arising under this Act, or under any other Act, whether past or future;" in s. 31, "any person authorised by this Act or by any future Act;" and in s. 32, "a person authorised by any past Act"; and s. 49, which contains the definitions, defines "past Act" to mean "any Act passed before the commencement of this Act, exclusive of this Act," and "future Act" to mean "any Act passed after the commencement of this Act." It is clear,

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the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: 'Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?' with a statement, if the Court think such statement desirable for the information of the person to whom the question is addressed, of the meaning of the case being dealt with summarily, and of the assizes or sessions (as the case may be) at which he will be tried if tried by a jury."

Sect. 19: "Where, in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a Court of summary jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence, or, save as hereinafter mentioned, for failing to do or to abstain from doing any act or thing required to be done or left undone, and such person is not otherwise authorised to appeal to a Court of general or quarter sessions, and did not plead guilty, or admit the truth of the information or complaint, he may, notwithstanding anything in the said Act, appeal to a Court of general or quarter sessions against such conviction or order.

"Provided that this section shall not apply where the imprisonment is adjudged for failure to comply with an order for the payment of money, for the finding of sureties, for the entering into any recognizance, or for the giving of any security."

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therefore, that this Act is expressly named whenever it is intended to include it.

Moyses, in support of the rule. Sect. 19 of the Summary Jurisdiction Act, 1879, was intended to give a larger right of appeal than previously existed, and it ought to be construed according to that intention. The words "under any Act" are wide enough to give a right of appeal in this case. If it had been intended to give no right of appeal from summary convictions under s. 12, it would have been very easy to say so in express terms. Sect. 19 itself expressly excepts cases where a person "pleads guilty or admits the truth of the information," and does not expressly except the cases where a person "consents to be dealt with summarily."

LAWRANCE, J. I am of opinion that this rule must be discharged, having come to the conclusion that there was no right of appeal to the quarter sessions. I think that the effect of s. 12 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), is that the person charged makes a kind of bargain with the magistrate to leave the decision of the matter to him instead of having it tried by a jury. It has been argued that some hardship may be inflicted upon a defendant, if he cannot appeal, because he does not know what he is consenting to; but it is the duty of the magistrate, under s. 12, to cause the charge to be read over to the person charged, and to ask him if he "desires to be tried by a jury," or "consents to the case being tried summarily," and to explain, if he thinks it desirable, the meaning of the case being dealt with summarily. I have no doubt that this was done in the present case. Then comes the question whether there is, under s. 19 of the Summary Jurisdiction Act, 1879, an appeal to quarter sessions from a conviction where the accused person has consented to be dealt with summarily under s. 12. Sect. 19 provides that "where, in pursuance of any Act, whether past or future, any person is adjudged . . . to be imprisoned without the option of a fine . . . and such person is not otherwise authorised to appeal to a court of general or quarter sessions, and did not plead guilty, or admit the truth of the information or complaint, he may, notwithstanding anything in the said Act,

appeal to a court of general or quarter sessions against such conviction or order." Now if it had been intended to give, by s. 19, a right of appeal against convictions under s. 12, it would have been very easy to say so; but, on the contrary, s. 19 purports expressly to give the right only in cases arising under other Acts where there is no appeal. I think that the words "in pursuance of any Act whether past or future," shew that it was only intended to give a right of appeal where past or future Acts do not give that right, and I cannot see anything in the Act of 1879 shewing an intention to give a right of appeal from convictions where the defendant has been dealt with summarily under s. 12. It has been contended that such an intention does appear, because at the end of s. 19 the cases where a person pleads guilty, or admits the truth of the charge, are expressly excepted from the right of appeal, whereas cases where a person consents to be dealt with summarily are not expressly excepted. Those exceptions, however, refer back to the words "in pursuance of any Act whether past or future." I am of opinion that the words "in pursuance of any Act, whether past or future," were used advisedly to prevent s. 19 applying to cases under s. 12. I am strengthened in that view on looking at the words of s. 20, which are, "a case arising under this Act, or under any other Act, whether past or future," and of s. 31, which are, "where any person is authorised by this Act or by any future Act," and of s. 32, which are, "where a person is authorised by any past Act," which all shew that the legislature distinguishes between "this Act," "past Acts," and "future Acts," and expressly mentions "this Act" when it intends any provision to apply to this Act.

WRIGHT, J. I am of the same opinion. For very many years, before 1879, there has been given by statute to courts of summary jurisdiction the power to deal with juvenile offenders for indictable offences, and, with consent, to convict them and sentence them to a lighter punishment than if they had been indicted; and, so far as I am aware, there has never been any case in which there has been an appeal from a conviction under such summary jurisdiction. That fact is not immaterial to the consideration of the Summary Jurisdiction Act of 1879, which extended that

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power of summary conviction to cases in which adults were charged. It seems to me that the legislature, in 1879, deliberately intended to continue the same procedure as previously existed in regard to juvenile offenders, and deliberately chose expressions which would exclude the right of appeal to quarter sessions in those cases in which the power of summary conviction was given when a person consented to be summarily dealt with. Since 1879, the Summary Jurisdiction Acts have been under review once at least, and the legislature has not indicated any intention to recognise the necessity of clearly giving a right of appeal in those cases. The practice throughout all these years must carry some weight. I think there was no right of appeal and this rule must be discharged.

Rule discharged.

Solicitor for the applicant: *Harman.*

Solicitor for the respondent: *Solicitor to the Treasury.*

W. A.

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Dec. 14, 15.

HAWKINS *v.* RUTTER.

County Court—Jurisdiction—Title to Corporeal or Incorporeal Hereditament —"Easement"—Right of Way—Navigable River—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 56, 60.

By s. 60, a county court judge shall have jurisdiction to try actions "in which the title to any corporeal or incorporeal hereditament shall come in question" where neither the value of the lands, &c., in dispute, nor the rent thereof, shall exceed 50*l.* by the year, "or, in case of an easement," where neither the value of the lands, &c., in respect of which the easement is claimed, or on, through, over, or under which it is claimed, "shall exceed 50*l.* by the year."

In an action tried in the county court, the defendant claimed as an easement the right, as one of the public, to ground his barge on the bed of a navigable river:—

Held, that s. 60 applied only to easements in respect of which there existed a dominant and servient tenement, so that no right to an "easement," within the meaning of that section, came in question in the action.

APPEAL from a decision of the judge of the Essex County Court, holden at Southend.

The plaint claimed 6*l.* 18*s.* for damages sustained by the plaintiff by reason of the defendant's barge having grounded

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on oyster layings occupied by the plaintiff in York Fleet, a navigable river, in or near the parish of Great Wakering.

The defendant's solicitor gave notice to the plaintiff to produce his documents of title to the oyster layings. At the trial the plaintiff's solicitor refused to produce the title deeds, and stated that he only proposed to prove a possessory title. The plaintiff was called, and gave evidence that he had been in possession of the layings for fourteen years. He was cross-examined as to his title, but no evidence was given by or on behalf of the defendant to contradict the statement as to the plaintiff's possession. The plaintiff also said that he thought the layings would let for 100*l.* a year. Objection was taken by the defendant's counsel that the county court judge had no jurisdiction to try the case, because the plaintiff's title to a corporeal or incorporeal hereditament came in question within the meaning of s. 60 of the County Courts Act, 1888 (51 & 52 Vict. c. 43) (1), and also that the defendant claimed an "easement," within that section, founded on his right, as one of the public, to ground his barge on the bed of a navigable river. The county court judge held that he had jurisdiction to try the case, and gave judgment for the plaintiff for 3*l.* 9*s.*

The defendant appealed.

Scrutton, for the defendant. The county court judge had no jurisdiction to try the case. The title to a corporeal or incorporeal hereditament came in question, because the plaintiff claimed a possessory title to the oyster layings, and his evidence

(1) By 51 & 52 Vict. c. 43, s. 56, jurisdiction is given to the county court to try all personal actions where the debt, demand, or damage claimed is not more than 50*l.*: "Provided, always, that, except as in this Act provided, the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments . . . shall be in question."

Sect. 60: "A judge shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of 50*l.* by the year, or in case of an easement or licence, where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed, shall exceed th sum of 50*l.* by the year."

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shewed that they would let for more than 50*l.* by the year. The real question tried was the question of title, because negligence by the defendant was not alleged in the plaint or particulars. A possessory title is one known to the law, and if the plaintiff has to prove possession in order to enable him to maintain his action, he has to prove his title. [He cited on this point: *Marsh* v. *Dewes* (1); *Timothy* v. *Farmer* (2); *Latham* v. *Spedding* (3); *Tomkins* v. *Jones.* (4)]

Next, the county court judge had no jurisdiction because the defendant, in setting up a right to ground his barge upon that portion of the river, was claiming an "easement" over land within s. 60 of the County Courts Act, 1888. A navigable river is a public highway, and the right of navigation on it is a right of way: *Mayor of Colchester* v. *Brooke* (5); *Anonymous Case* (6); *Orr Ewing* v. *Colquhoun.* (7) A public right of way is an "easement": *Dovaston* v. *Payne.* (8)

Wightman Wood, for the plaintiff. As to the first point, the title to a corporeal or incorporeal hereditament did not come in question. The plaintiff's possession of the oyster layings was not disputed, and no issue as to whether he was possessed or not was ever tried. The oysters were put on the layings as the plaintiff's personal property under the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), which provides that oysters put on layings shall be deemed to be the personal property of the person putting them there. The issue, therefore, was whether by grounding his barge on the plaintiff's personal property, the defendant had committed a trespass, causing damage to the plaintiff. *Latham* v. *Spedding* (3) is an authority for the proposition that in an action for trespass to land, a plea of "not possessed" does not necessarily cause the plaintiff's title to come in question. As to the other point, the word "easement" in s. 60 of the County Courts Act, 1888, is used in its proper technical sense, i.e., in the sense of a right existing upon or over the land of another. It cannot include a public right of navigation, upon which a

(1) 17 Jur. 558.
(2) 7 C. B. 814.
(3) 17 Q. B. 440.
(4) 22 Q. B. D. 599.
(5) 7 Q. B. 339.
(6) 1 Camp. 517, n.
(7) 2 App. Cas. 839, per Lord Hatherley.
(8) 2 H. Bl. 527.

value cannot be put. The section refers only to a private right of easement, in respect of which there exists a dominant and servient tenement, and excludes jurisdiction where neither the value of the dominant nor of the servient tenement shall exceed the sum of 50*l.* a year. The easement must be a hereditament. The easement here, being a public right of way, is not a hereditament, it does not descend to the heir.

Scrutton, in reply. The meaning of the word "easement" in s. 60 cannot be narrowed in the way suggested, because the word "licence" is also used, and there is no dominant tenement where a licence to do something on the land of another is given.

LORD COLERIDGE, C.J. This is an application for a prohibition to the judge of the county court of Essex. The application is by way of appeal from the decision of Williams, J., who refused to grant a writ of prohibition. I desire to say that my judgment in this case is given entirely with reference to the form in which the appeal comes before us. I do not deny that the case may be a very proper one to be tried in a Superior Court. The application in form is for a prohibition to the county court which has tried the case to prevent further proceedings in it. It is argued for the defendant that by so trying it the county court judge has exceeded his jurisdiction, because the title to a corporeal or incorporeal hereditament came in question. I do not think it did. The jurisdiction depends upon s. 60 of the County Courts Act, 1888. [His Lordship read the section.]

Now there is no question here of claiming a licence, and I express no opinion with respect to the term "licence." The defendant claims only an easement to do what he has done. No doubt the term "easement" has, somewhat loosely and inaccurately perhaps, but still with sufficient accuracy for some purposes, been said to define the case of a public right of way, in which case there exists no dominant and servient tenement; but in strictness, and according to the proper use of legal language, the term "easement" does imply a dominant tenement in respect of which the easement is claimed, and a servient tenement upon which the right claimed is exercised. Here there is no dominant and servient tenement. I think, on the true construction of s. 60,

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the easement to which that section is meant to apply must be an easement in the strict legal sense of the term, i.e., an easement in respect of which there is a dominant and servient tenement; the description in the section of the case in which the county court shall have jurisdiction to try the right to an easement is, "or in case of an easement . . . where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement . . . is claimed, or on, through, over, or under which such easement . . . is claimed" (and the word "such" manifestly ties down the easement to one which is claimed in respect of the lands, tenements, or hereditaments before mentioned), "shall exceed the sum of 50*l.* by the year." I think the words of the section clearly refer to the ordinary case of an easement where there is a dominant and servient tenement. There is none here, and no question of an easement such as the section contemplates arose in the action. In my opinion, therefore, the enactment in no way interferes with the jurisdiction of the county court to try the case. It was further argued that the title to land came in question, because the plaintiff claimed a possessory title to the oyster beds. But there was really no dispute about the title to land. It was admitted between the parties that the plaintiff was in possession, and that he had been in possession for fourteen years. Possibly if he had been obliged to shew ownership of the oyster bed, a question of title might have arisen; but it was only necessary for him, in order to maintain his action for the trespass complained of, to shew that he was in possession, and his possession of the portion of the river bed upon which the defendant's barge grounded was not disputed.

A. L. SMITH, J. I entirely agree with the judgment of my lord, and am of opinion that the decision of Williams, J., was right. The first question is, whether or not in this case the title to a corporeal or incorporeal hereditament came in question within the meaning of s. 60 of the County Courts Act, 1888. I am of opinion that it did not. I dispute the proposition that, where a man goes to try an action for a trespass, and gives evidence that he was in possession of the premises upon which he

alleges the trespass was committed, he thereby gives evidence of his title. Here admittedly the plaintiff was, and for fourteen years had been, in possession. I quite agree that the defendant wished to dispute the plaintiff's title, and gave him notice to produce his title deeds. The plaintiff refused to produce them, and said in effect, "I have been in possession for fourteen years." That is sufficient to entitle him to say, "You have come on to my land and done me damage," and to recover for the trespass. It was next argued that the right to an easement claimed by the defendant came in question. It was said that an "easement" had been held to be a proper definition of the right of the public over a highway, and *Dovaston* v. *Payne* (1) was relied on in support of that proposition. It was further said that in *Mayor of Colchester* v. *Brooke* (2) the right of navigation in a navigable river was held to be a right of way, and therefore that the right claimed by the defendant was claimed in respect of an "easement" within s. 60, so as to prevent the county court having jurisdiction. But in my opinion the "easement" mentioned in that section does not apply to or include the easement of a public right of way. I think it applies only where there is a dominant and servient tenement, the value or the reserved rent of either of which does not exceed the sum of 50*l.* by the year. This appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Brook & Sons, for George Wood, Southend.*

Solicitors for defendant: *Farlow Jackson.*

(1) 2 H. Bl. 527.

(2) 7 Q. B. 339.

W. A.

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Jan. 19;
Feb. 13, 20.

RYLEY *v.* MASTER.
SHEBA GOLD MINING COMPANY, LIMITED *v.* TRUBSHAWE.

Practice—Writ of Summons—Special Indorsement — Claim for Interest — "Liquidated Demand"—Order III., *r.* 6; *Order* XIV., *r.* 1.

Where a writ of summons was indorsed, under Order III., r. 6, with a claim for a sum of money, and for interest thereon at 5 per cent. per annum from the date of the writ till payment or judgment, and it did not appear that the interest was claimed by statute or under any contract between the parties:—

Held, that the plaintiff was not "seeking only to recover a debt or liquidated demand in money" within the meaning of Order III., r. 6; and, therefore, that the writ was not "specially indorsed" so as to enable him to obtain final judgment in the action under Order XIV., r. 1.

An indorsement, purporting to be a special indorsement under Order III., r. 6, claimed a balance due for goods sold. After stating the "place of trial," and after the signature of the plaintiffs' solicitors, there came a claim for interest, at the rate of 5*l.* per centum per annum, from the date of the writ till payment or judgment, and after that claim a statement that if the amount claimed was paid to the plaintiffs, or their solicitors, within four days from the service of the writ, further proceedings would be stayed. On an application for leave to sign judgment under Order XIV., r. 1, the plaintiffs' affidavits shewed that the claim for interest was not made upon any contract to pay interest; but that they supposed they were entitled to recover it, and asked for judgment, not only for the balance due, but also for the interest claimed:—

Held, that the claim for interest must be treated as part of what purported to be the special indorsement, and, therefore, the writ was not "specially indorsed" under Order III., r. 6, so as to entitle the plaintiffs to have final judgment under Order XIV., r. 1.

THESE were appeals from two decisions of Charles, J., at chambers.

In *Ryley* v. *Master* the writ of summons in the action purported to be specially indorsed under Order III., r. 6, and was as follows:—

"Statement of Claim.

"The plaintiff's claim is for money paid by the plaintiff to the use of the defendant under a bill of exchange, which was accepted by the plaintiff for the accommodation of the defendant, with interest thereon from the time of payment.

"Particulars.

"1891. Nov. 13. To amount paid Messrs. Mossop & Rolfe, solicitors for Mr. Edwin Bromurch, for principal and interest

under a bill of exchange for 50*l.*, dated July 1st, 1891, drawn by the defendant and accepted by the plaintiff, payable four months after date to the order of the defendant, and indorsed by him.

"Debt 50*l.*, and interest 1*s.* 50*l.* 1*s.*

"And the plaintiff claims further interest at 5 per cent. per annum on the said sum of 50*l.* from the date hereof till payment or judgment."

On an application for leave to sign final judgment under Order XIV., Charles, J., affirmed the order of a master allowing final judgment. The defendant appealed.

Bonner, for the defendant. It is submitted that the learned judge at chambers ought not to have allowed the plaintiff to sign final judgment. To bring the case within Order XIV., r. 1, the writ must be specially indorsed in compliance with the terms of Order III., r. 6. The plaintiff must "seek to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt)," &c. The claim for interest at 5 per cent. per annum from the date of the writ till payment or judgment is an unliquidated demand, and the indorsement is therefore bad as a special indorsement under Order III., r. 6. Interest can only be claimed under statute or by special contract; and if such special contract exists, it is for the jury to find what interest, not exceeding 5 per cent. per annum, is payable under it, and their finding is in the nature of an assessment of damages: *Carr* v. *Edwards*. (1) The rule is also stated by Abbott, C.J., in *Higgins* v. *Sargent*. (2) In *Rodway* v. *Lucas* (3) the Court held that s. 25 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), only applied to cases where the demand which plaintiff sought to recover was a liquidated demand, whether or not it included a claim for interest. The words of s. 25 are practically the same as those in Order III., r. 6. In *Elliott* v. *Roberts* (4) a writ indorsed as this is with a claim for interest was held not specially indorsed so as to give power to

(1) 3 Stark. 132.
(2) 2 B. & C. 348.
(3) 10 Ex. 667.
(4) 36 Sol. J. 92.

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allow final judgment to be signed on it. If the writ was not a good specially-indorsed writ under Order III., r. 6, at the time when the summons was taken out under Order XIV., r. 1, it cannot afterwards be amended: *Gurney* v. *Small.* (1)

[He also contended that the indorsement on the writ disclosed no cause of action; but as the judgment of the Court was not given upon that point, it is thought unnecessary to set forth the argument.]

A. Walter, for the plaintiff. The decision of the learned judge at chambers was right. The indorsement on the writ is sufficient to constitute a special indorsement within Order III., r. 6. The defendant's liability to pay interest at the commercial rate is implied by law from the circumstances attending the contract. The plaintiff, as an accommodation acceptor of the bill of exchange, is a guarantor entitled to indemnity from the principal debtor, and the indemnity to be complete must include interest upon the sum which the guarantor has been compelled to pay: *Reynolds* v. *Doyle* (2); *McKewan's Case* (3); *Petre* v. *Duncombe.* (4)

[*Bonner* admitted, for the purposes of this case, that the claim of 1*s.* for interest up to the date of the writ did not make the indorsement bad as a special indorsement.]

By s. 57 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), the damages to be recovered against the parties to a dishonoured bill "shall be deemed to be liquidated damages," and interest may be claimed as damages from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case. Though the action is not brought on the bill here, the analogy of the statute should be applied to this contract of indemnity, and the claim for interest from the date of the writ till payment or judgment should be treated as a claim for liquidated damages. The amount could be settled without difficulty by the master. If that view be wrong, the claim for interest from the date of the writ till payment or judgment can be disregarded, as being a

(1) [1891] 2 Q. B. 584.
(2) 1 M. & G. 753.
(3) 6 Ch. D. 447, per Malins, V.C. at p. 455.
(4) 20 L. J. (Q.B.) 242.

claim inserted under a mistake of law, and the plaintiff is, at any rate, entitled to be allowed to sign judgment, under Order XIV., for 50*l.* 1*s.* In *Waite* v. *Power* (1) the Court of Appeal refused to set aside a judgment, obtained under Order XIV., on a writ indorsed as this is.

[He also referred to *Blood* v. *Robinson.* (2)]

Bonner, in reply. Assuming that a contract to pay interest by way of giving a complete indemnity may be implied, the demand must still be a liquidated demand in order to satisfy the words of Order III., r. 6. The damages cannot be liquidated damages until the rate of interest and the amount be ascertained. If s. 57 of the Bills of Exchange Act, 1882, applied to this claim, the terms of sub-s. 3 dispose of the suggestion that interest could be treated as liquidated damages which may be claimed by a specially indorsed writ under Order III., r. 6, because that sub-section provides that, where interest may be recovered as damages under the Act, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

Cur. adv. vult.

In *Sheba Gold Mining Co., Limited* v. *Trubshawe* the writ of summons also purported to be specially indorsed under Order III., r. 6. By the indorsement the plaintiffs claimed a balance of 3514*l.* 15*s.* 5*d.* for goods sold, and gave particulars shewing the balance due. The indorsement then proceeded as follows:—

"Place of Trial, London.

"(Signed) Ashurst, Morris, Crispe, & Co."

After the signature came the following words:—

"The plaintiffs also claim interest on the sum of 3514*l.* 15*s.* 5*d.* from the date of this writ till payment or judgment at the rate of 5*l.* per centum per annum. And the sum of 3*l.* 3*s.* (or such sum as may be allowed on taxation) for costs. If the amount claimed is paid to the plaintiffs or their solicitors or agents within four

(1) Cited in the Annual Practice, 1892, p. 202. (2) 36 Sol. J. 203.

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days from the service thereof, further proceedings will be stayed."

The affidavits verifying the cause of action, made under Order XIV., r. 1, shewed that the claim for interest was not made upon any contract to pay interest; that the plaintiffs' advisers supposed that they could recover interest; that it was intended to recover it, and that judgment was asked, not only for the balance due for goods sold, but for interest from the date of the writ till payment or judgment.

On an application for leave to sign final judgment under Order XIV., r. 1, Charles, J., affirmed the order of a master giving the defendant leave to defend on paying a sum into Court within fourteen days, otherwise judgment.

The defendant appealed.

Moulton, Q.C., and *James Fox*, for the defendant. In this case also the claim for interest is a claim for unliquidated damages, and therefore Order XIV. cannot be applied. Interest could only be given by a jury under the statute 3 & 4 Wm. 4, c. 42, s. 28, and the decision in *Rhymney Ry. Co.* v. *Rhymney Iron Co.* (1) makes it clear that interest in this case is not recoverable. Here the claim for interest was intended to be, and is, an effective claim. The plaintiffs, therefore, are not "seeking only to recover a debt or liquidated demand in money" within the meaning of those words in Order III., r. 6. They cannot make their claim a liquidated demand merely by claiming interest at the commercial rate—5 per cent.

[They also referred to *Cook* v. *Fowler*. (2)]

Willis, Q.C., and *Bremner*, for the plaintiffs. It must be conceded that in view of the decision in *Rhymney Ry. Co.* v. *Rhymney Iron Co.* (1), the claim for interest in the indorsement does not operate as a demand under 3 & 4 Wm. 4, c. 42, s. 28, and that interest cannot properly be claimed in this case. But the claim for interest is not necessarily connected with the substantial claim. Here what is claimed as of right is the 3514*l.* 15*s.* 5*d.*; the claim for interest being by way of suggestion that, when the matter comes before a judge, jury, or master, the plaintiffs will ask for

(1) 25 Q. B. D. 146. (2) Law Rep. 7 H. L. 27.

interest. The word "claim" is only inserted in order to comply with s. 28 of 3 & 4 Wm. 4, c. 42. *Rodway* v. *Lucas* (1) shews that the writ should be deemed to be a specially indorsed writ if it purports so to be; and that, if no impropriety or irregularity appears on the face of it, the indorsement must be assumed to be a proper special indorsement, and that interest must be assumed to be payable by agreement. Here the claim for interest is not necessarily any part of the special indorsement; it comes after the signature of the names of the plaintiffs' solicitors, and the forms in Appendix C, s. IV., which are referred to in Order III., r. 6, as the forms of "special indorsements," all end with the signature of the plaintiffs' solicitors. The claim for interest is a mere irregularity, which can be dealt with by the Court, and does not render bad that which is the real special indorsement: *Waite* v. *Power*. (2) The distinction between *Rodway* v. *Lucas* (1) and the present case is that there the claim for interest was not distinct.

Moulton, in reply. The insertion of the claim for interest was no irregularity on the plaintiffs' part; it was an act done intentionally, and not like a mere omission or mistake. The claim is for damages by way of interest, and the fact that it comes after the signature of the plaintiffs' solicitors does not the less make it part of the effective claim put forward by the plaintiffs. Supposing after the signature of the plaintiffs' solicitors there had come a claim for another sum, not for interest, but in respect of some other matter, the defendant would not have been entitled to disregard it. The clause at the end of the indorsement, "if the amount claimed, &c.," includes the claim for interest, and the plaintiffs' affidavits support that claim. *Waite* v. *Power* (2) has not been reported, and it is uncertain what was the irregularity upon which judgment was sought to be set aside.

Cur. adv. vult.

Feb. 20. LORD COLERIDGE, C.J., read the following judgments of the Court (Lord Coleridge, C.J., Hawkins, Wills, and Lawrance, JJ., in *Sheba Gold Mining Co., Limited* v. *Trubshawe*,

(1) 10 Ex. 667. (2) Cited in the Annual Practice, 1892, p. 202.

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and Lord Coleridge, C.J., Hawkins, Wills, Lawrance, and Wright, JJ., in *Ryley* v. *Master*) (1):—

SHEBA GOLD MINING CO., LIMITED *v.* TRUBSHAWE.

LORD COLERIDGE, C.J. The plaintiffs in this case sue for a balance of 3514*l.* 15*s.* 5*d.* for goods sold. The writ bears a special indorsement to that effect which, after stating the balance due, proceeds as follows:—[His Lordship stated the indorsement as set out, ante].

Application has been made for judgment, under Order XIV., for the sum of 3514*l.* 15*s.* 5*d.*, together with interest at the rate of 5 per cent. from the date of the writ until judgment. The affidavits make it clear that the claim for interest is not made upon any contract to pay interest. It is no doubt founded upon the supposition that the indorsement of the claim for interest operates as a demand under the statute 3 & 4 Wm. 4, c. 42, s. 28. It is admitted on both sides that this view cannot be sustained in view of the decision in *Rhymney Ry. Co.* v. *Rhymney Iron Co.* (2), and that in this case no interest is in fact recoverable. The affidavits make it equally clear that the plaintiffs' advisers supposed that they could recover interest, that it was intended to recover it, and that judgment was asked, not only for the balance due for goods, but for interest from the date of the writ, and for interest which, if recoverable, was in the nature of unliquidated damages. Order XIV. applies only when the defendant has appeared to a writ specially indorsed under Order III., r. 6. We think it clear that Order III., r. 6, applies only to cases in which the demand which the plaintiff seeks to recover, whether or not it be made up in part of interest, is a liquidated demand—in other words, to cases in which the interest is payable under a contract, and not by way of unliquidated damages. It was so held under words almost identical with

(1) Wright, J., was present during the arguments in *Sheba Gold Mining Co., Limited* v. *Trubshawe*; but Lord Coleridge, C.J., before reading the judgment in that case, stated that Wright, J., though he did not dissent, took no part in the decision, the appeal being in substance, though not in form, from a decision given by him at chambers.

(2) 25 Q. B. D. 146.

those now under consideration, contained in the Common Law Procedure Act, 1852: *Rodway* v. *Lucas*. (1) If any distinction can be drawn between the two enactments, it is that the words of Order III., r. 6, are rather more clearly in favour of such a construction than those of the Common Law Procedure Act. When, therefore, the plaintiffs' affidavits put it beyond controversy that they were intending and hoping to recover in this action unliquidated damages on account of interest, it seems at first sight difficult to see how it can be said that in this action they are "seeking only to recover" a liquidated sum. It has been strenuously argued, however, that the only test of what they are seeking to recover is the form of the writ itself, and that the portion of the indorsement on the writ which claims the interest is no part of the "special indorsement," which ends with the signature of the plaintiffs' solicitors following the mention of the place of trial; and each of these propositions must be examined, and it will be more convenient to take the second proposition, relating purely to the matter of form, first. The argument is based upon the final words of the rule which says that the "special indorsement shall be to the effect of such of the forms in Appendix C, s. IV., as shall be applicable to the case." The forms given in Appendix C, s. IV., all end, it was said, with the signature of the solicitor, and therefore the "special indorsement" goes no further, and what follows does not prevent the writ from being "specially indorsed" under Order III., r. 6. We think that there is a fallacy in this argument. The forms given in Appendix C, s. IV., are the forms of statements of claim generally, and are not adapted, as they stand, for indorsement on a writ. Every one of them ends with "delivered," which, when filled up, would be "Delivered by Messrs. A. and B., solicitors for the plaintiff on" such a day—words inapplicable to an indorsement on the writ. Appendix A, No. 2, gives the form of a specially indorsed writ, which after the signature proceeds, "and the sum of £ (or such sum as may be allowed on taxation) for costs. If the amount," &c. Indeed, it is clear from forms 1 and 2 of Appendix A, that such an indorsement

(1) 10 Ex. 667.

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as, "The plaintiff also claims interest on 3514*l.* 15*s.* 5*d.* from the date of this writ," &c., is no formal part of any writ at all, whether specially indorsed or not. If, therefore, any effect is to be given to it, it must be considered as a part of the indorsement, and to be taken into account in determining whether it answers the description of a proper "special indorsement," although it comes after the signature. We think this is the true way of looking at it. How can it be discarded altogether? In many cases it is a very important element in the claim. The notice that the defendant may stop the action by payment within four days clearly embraces it within the expression "the sum claimed," and we think it would be a return to the worst features of a system in which form was preferred before substance if we were to say so important a demand was to be treated as non-existent because it happened to be a kind of postscript to the rest of the claim instead of preceding the signature. We treat it, therefore, as an essential part of the indorsement. So regarded, we think that the claim in the present case departs from the requirements of a special indorsement in two respects: (1.) it does not shew that the interest is claimed as being due by contract; (2.) no definite sum is claimed. All the forms given in Appendix C, s. IV., in which interest is claimed are cases of interest due either by express covenant, or upon bills or notes. By s. 57 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), the last-mentioned interest is to be deemed liquidated damages; and we think that a statement of claim which demands interest, but shews no legal liability to pay it, is upon general principles defective. Again, all the forms claiming interest mention the specific sum claimed. We think this is as it should be. It is important that a man, who is to be proceeded against summarily for judgment, should know exactly how much he has to pay if he wishes to stay the action, and should not be called upon to take the risks of calculation. A claim for interest which is not thus specific departs in a material and important respect from the forms to which a special indorsement is required to conform. The cases of *Elliott* v. *Roberts* (1) and *Blood* v. *Robinson* (2), do

(1) 36 Sol. J. 92.

(2) 36 Sol. J. 203.

not profess to be fully reported; but we take them to have proceeded upon the same lines as the foregoing remarks, and to be entirely in harmony with the view we have expressed. So much for the question of form. It is satisfactory to have solid grounds of substance for coming to the same conclusion. We think that the question what a plaintiff "seeks to recover" is not, upon an application for judgment under Order XIV., concluded necessarily by the indorsement on the writ, especially if it be ambiguous. In *Rodway* v. *Lucas* (1), the indorsement was indistinguishable from that in the present case. The application there was to set the judgment aside. The Court held that—after judgment, at any rate—the indorsement was capable of being construed as covering the case of interest due under a contract, and, there being no affidavit of merits, refused to set the judgment aside; but they added that, if a case should arise in which the special indorsement should be resorted to, although the interest was, in fact, claimable only as damages, they would set aside the judgment, with costs, as an abuse of the process of the Court. In other words, the Court would disregard the form and look to the substance, and if satisfied upon the affidavits that, however correct the claim might be in form, the case was one in which the plaintiff had no business to treat the interest as a liquidated demand, and attempt to get the benefit of the special indorsement, they would prevent him from resorting to a remedy to which he was not entitled. It seems to us that the present case falls precisely within this principle. No one suspects the advisers of the plaintiffs of an intention to strain or misapply the process of the Court; but it is plain from their own affidavits that they have, in fact, been attempting to get judgment under Order XIV. for unliquidated damages in the shape of interest. It matters not in such a case whether the writ be right or wrong in form. It is not a case in which they have any business to resort to Order XIV., and they must take the consequences.

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This case is governed by the decision in the *Sheba Gold Mining Co., Limited* v. *Trubshawe.* That which professes to be the

(1) 10 Ex. 667.

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special indorsement shews no liability to pay interest, and claims no definite and specific sum. Order XIV. is not applicable.

Appeals allowed.

Solicitor for the plaintiff in *Ryley* v. *Master*: *Morran.*

Solicitors for the defendant: *Hughes, Hooker & Co.*

Solicitors for the plaintiffs in *Sheba Gold Mining Co., Limited* v. *Trubshawe*: *Ashurst, Morris, Crispe & Co.*

Solicitors for the defendant: *Davidson & Morris.*

W. A.

C. A.

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March 29.

[IN THE COURT OF APPEAL.]

WILKS *v.* WOOD.

Practice—Specially-indorsed Writ—Liquidated Demand—"With or Without interest"—Claim for Interest from date of Writ till Payment or Judgment—Order III., r. 6, Order XIV., r. 1.

Where a plaintiff claims by his writ interest not arising under a statute or by contract express or implied, he does not "seek only to recover a debt or liquidated demand" within Order III., r. 6, and the writ is consequently not a specially-indorsed writ on which an order for judgment can be made under Order XIV., r. 1.

APPEAL from an order of the Divisional Court giving leave to the plaintiff to sign judgment under Order XIV., r. 1.

The writ was indorsed as follows: "The plaintiff's claim is for the price of goods sold and delivered to the defendant at his request (then followed particulars of the goods supplied and their price, which amounted in all to 49*l.* 3*s.* 4*d.*), and the plaintiff also claims interest on 49*l.* 3*s.* 4*d.* from the date of the writ until payment or judgment. Place of trial, London. (Signed) Thos. Durant. And the sum of 3*l.* 10*s.* (or such sum as may be allowed on taxation) for costs. If the amount claimed be paid to the plaintiff or his solicitor within four days from the service hereof further proceedings will be stayed."

The plaintiff applied at chambers for leave to sign judgment under Order XIV., r. 1, and the master gave the defendant conditional leave to defend on paying into Court the amount claimed. An appeal of the defendant to a judge was dismissed.

The defendant appealed to a Divisional Court and it was ordered that "the defendant's appeal herein be dismissed, and that the plaintiff be at liberty to sign judgment in this action for the amount of the claim indorsed on the writ, and that the costs be costs in the cause; and it is further ordered that if the defendant do within ten days pay the amount of the judgment into Court, then that execution thereon be stayed until the defendant's counterclaim be determined."

The defendant appealed.

Channell, Q.C., and *T. Terrell*, in support of the appeal. The writ is not specially indorsed under Order III., r. 6. A writ may be specially indorsed where "the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest." Interest here means an ascertained sum payable either under statute or by contract, and not an amount which can only be given by a jury in the nature of damages under 3 & 4 Wm. 4, c. 42, s. 28. If the writ contains anything that is not a special indorsement, the writ is not specially indorsed: *Gurney* v. *Small*. (1) The point has been before a Divisional Court consisting of five judges in *Sheba Gold Mining Co.* v. *Trubshawe* (2), and it is submitted that the decision in that case was right. There the signature of the solicitor appeared before the claim for interest, but here that claim is attached to the claim for the debt. If a writ is specially indorsed, the plaintiff may obtain leave to sign judgment if there is no defence, but if it is not specially indorsed the defendant may require a statement of claim and need not take any step till he gets it. Whether the defendant may hold his hand or not depends, therefore, on the indorsement, and the defendant's right would be restricted if this were held to be a specially-indorsed writ.

[They cited also *Rodway* v. *Lucas*. (3)]

Loehnis, contrà. The position is that there has been a claim for interest, which may or may not arise on a contract. The defendant should make up his mind whether he will pay interest

(1) [1891] 2 Q. B. 584. (2) Ante, p. 674.
(3) 10 Ex. 667.

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or not; and if he does not pay it, the plaintiff would go on at his peril. When the plaintiff proceeds under Order XIV., r. 1, the claim for interest becomes a nullity, and the order drawn up would be in the form Ap. K, No. 8, for the amount indorsed on the writ of summons, with interest, "if any," on default of payment into Court of the amount named.

LORD ESHER, M.R. The plaintiff is in this position, that he has brought an action for goods sold and delivered, and has applied to have judgment entered for him under Order XIV., r. 1, on the ground that there is no defence to the claim. The defendant has taken the point that Order XIV., r. 1, cannot be applied, because, though he did not pay the debt before action, nor when the writ was issued, and has not paid it since, yet if the writ had been different, and omitted the claim for interest, he would have had an opportunity of seeing what he ought to pay, and paying it four days after the writ was served. That is his point, and all I can say is that the word "only" in the rule means "only," and that if anything else is added to the liquidated demand, the writ does not come within the definition of a specially-indorsed writ. The plaintiff, who has a valid cause of action, has added to the claim which would have supported a judgment under Order XIV., r. 1, a further claim which prevents the operation of that rule, and the appeal must, therefore, be allowed.

FRY, L.J. The question we have to determine arises on Order XIV., r. 1, and it is contended that the judgment which has been entered for the plaintiff could not properly be ordered under that rule. That rule is only applicable where the defendant appears to a writ which is specially indorsed under Order III., r. 6. That rule is substantially founded on s. 25 of the Common Law Procedure Act, 1852, as to special indorsement of particulars of liquidated demand. It deals with the case where the plaintiff seeks only to recover a debt or liquidated demand, with or without interest, arising in one of the several modes specified, and states that the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of

the claim. It is said that the words, "with or without interest," justify a special indorsement where there is no contract to pay interest. I think that is not so; but that the rule refers to cases where both the principal sum due and the demand of interest are liquidated sums, and the latter arises by contract, express or implied, or by statute. That was the opinion of the Court of Exchequer in *Rodway* v. *Lucas* (1), which arose under the Common Law Procedure Act, and I cannot accept the suggestion that was made that that view was modified by what the Chief Baron is reported to have subsequently said. It appears to me to be important that we should not attempt to add to the effect of the words of the rule, which do not give countenance to the argument that a writ is specially indorsed which claims interest that can only be given by a jury, and if a jury think fit.

One of the objects of a special indorsement is that the sum may be an ascertained one, so that the defendant may know what amount he has to pay to stay further proceedings. To my mind, the obvious intention of the legislature would be defeated if we held that such a claim for interest as that in the present case, where a claim for an unliquidated amount is added to a liquidated demand could be treated as a special indorsement.

I quite agree with the decision that was arrived at by the judges of the Queen's Bench Division in the *Sheba Gold Mining Co.* v. *Trubshawe* (2), and with the grounds given for that judgment. This appeal should, therefore, be allowed.

LOPES, L.J. It is clear that the claim for interest on this writ was not made on any contract but under the erroneous idea that such a claim on a writ acts as a demand under 3 & 4 Wm. 4, c. 42, s. 28, of a liquidated sum. That section says that upon all debts or sums certain the jury may allow interest from the time when the debt was due or from the time when a demand, giving notice that interest would be claimed, was made, and such a claim of interest is therefore clearly not for a liquidated sum. The plaintiff seeks to put in force a summary remedy, which is, without doubt, very valuable, but of which the application requires to be strictly watched. The procedure under Order XIV.,

(1) 10 Ex. 667. (2) Ante, p. 674.

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r. 1 is founded on Order III., r. 6, and it is a condition precedent to its application that there should be a specially-indorsed writ within the meaning of the latter rule. That rule refers to the case where the plaintiff seeks only to recover a debt or liquidated demand, and it is not immaterial to notice that rule 7 provides that, where the plaintiff's claim is for a debt or liquidated demand only, the indorsement must state the amount claimed for debt, or in respect of the demand, and for costs respectively, and is further to state that, upon payment thereof, within four days after service, further proceedings will be stayed. The object plainly is that the defendant may be able to look to the writ and see without any assistance what sum he must pay in order to stay the action. In the present case the plaintiff is seeking to recover interest in the nature of damages, and, as appears by the statute of Wm. 4, to be given by the jury, and such a claim cannot be said to be a claim for a liquidated sum. If we decided otherwise than in accordance with *Sheba Gold Mining Co.* v. *Trubshawe* (1) we should be contravening the rules, and not carrying them out. I think that decision is quite correct, and that it follows that the decision appealed from in this case must be reversed.

Appeal allowed.

Solicitor for plaintiff: *Charles Butcher.*
Solicitors for defendant: *Harcourt & Son.*

(1) Ante, p. 674.

A. M.

LONDON AND UNIVERSAL BANK *v.* EARL OF CLANCARTY. 1892 *March* 17.

Practice—Specially Indorsed Writ — Liquidated Demand—Action on Promissory Note—Claim of Interest from date of Writ till Payment or Judgment—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 57—*Order* III., *r.* 6—*Order* XIV., *r.* 1.

In an action upon a bill of exchange or promissory note to recover the amount of such bill or note, the writ may, by virtue of s. 57 of the Bills of Exchange Act, 1882, be specially indorsed under Order III., r. 6, with a claim for interest from the date of the writ "till payment or judgment," and leave may be given under Order XIV., r. 1, to sign final judgment upon such specially indorsed writ.

APPEAL of the defendants from an order of Pollock, B., at chambers, giving the plaintiffs leave to sign final judgment under Order XIV., r. 1.

The action was brought to recover the amount of two promissory notes with an ascertained sum for interest to the date of the writ, and there was a further claim for interest at 5 per cent. until payment or judgment. The indorsement on the writ was in the following terms:—

"The plaintiffs' claim is for principal and interest due upon two joint and several promissory notes made by the defendants the Right Hon. the Earl of Clancarty and Mr. Cave Browne Cave, in favour of the defendant Captain James Gordon Miller and indorsed to the plaintiffs for value, both dated November 10, 1891, and payable three months after date. The said notes were duly presented for payment and dishonoured, of which the defendants have had notice.

"*Particulars.*

"February 13, 1892.

	£	*s.*	*d.*
"To amount of promissory note due this day	500	0	0
"The like	500	0	0
"To interest on both bills to date of writ at 5 per cent. . . .		16	6
	£1000	16	6

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"The plaintiffs also claim interest at the rate of 5 per cent. per annum, until payment or judgment." (1)

Willoughby Williams, for the defendants. The writ is not specially indorsed under Order III., r. 6. Apart from the provisions of s. 57 of the Bills of Exchange Act, 1882, the indorsement would clearly not be a special indorsement, for it contains a claim for interest the amount of which is not only unliquidated and unascertained, but is unascertainable at the time when the indorsement is made, so that the defendants cannot know from the indorsement itself what amount they have to pay if they do not desire to defend the action. All the forms of special indorsements and statements of claim on bills or notes which are given in Appendix C to the Rules of the Supreme Court specify the exact amount due for interest; they none of them contain a general claim for an unascertained sum. The case is covered by the decision in *Sheba Gold Mining Co.* v. *Trubshawe*, and *Ryley* v. *Master* (2). It is true that in the latter case the action was not brought on the bill itself, but was brought by the accommodation acceptor to recover money paid

(1) By s. 57 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61): "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

(1.) "The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser—

"(*a*) The amount of the bill;

"(*b*) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;

"(*c*) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2.) "In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3.) "Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

(2) Ante, p. 674.

to the use of the drawer; that case is, however, indistinguishable in principle from the present. The question is not affected by s. 57 of the Bills of Exchange Act, 1882; before that section no interest at all could have been recovered by the holder after maturity except as damages, which would have had to be assessed; that section gives the holder a right to interest as liquidated damages, but only to the same extent as a plaintiff would be entitled to on any ordinary covenant to pay money. The very provision that interest is to be recovered "as liquidated damages" shews that the amount must be fixed, and there is nothing to shew that the interest spoken of in the section does not mean interest to the date of the writ—which, indeed, is the only date up to which the amount can be fixed or ascertained. By s. 57, sub-s. 3, a discretion as to the amount of interest is given to the tribunal which ultimately adjudicates upon the case, and a writ cannot be specially indorsed with a claim the amount of which depends entirely upon the way in which the tribunal may at some future period exercise its discretion. It was never intended that the judge at chambers in giving judgment under Order XIV. should exercise his discretion by allowing interest up to judgment.

[He also cited *Elliott* v. *Roberts* (1); *Blood* v. *Robinson*. (2)]

W. Whately, for the plaintiffs. The order appealed from is right. The effect of s. 57 of the Bills of Exchange Act is to make this claim for interest a liquidated demand within the meaning of Order III., r. 6; the actual amount of the interest is to be ascertained by the tribunal, which for the purposes of Order XIV. is the judge at chambers, who takes the place of the jury. The case of *Elliott* v. *Roberts* (1) is not an authority to the contrary; the decision there went upon the ground that the plaintiff was claiming interest at an unusual and excessive rate, without shewing that it was claimed under any agreement to pay at that rate.

[A. L. SMITH, J. You do not claim under any agreement here.]

No; but interest is only claimed at the ordinary commercial rate of 5 per cent., and even then the judge can, under s. 57,

(1) 36 Sol. J. 92. (2) 36 Sol. J. 203.

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allow or disallow it as he pleases. The claim in *Sheba Gold Mining Co.* v. *Trubshawe* (1) was for interest in the nature of unliquidated damages under 3 & 4 Wm. 4, c. 42, s. 28, and the Court in its judgment makes a special exception of the cases of bills of exchange and other negotiable instruments.

Willoughby Williams, in reply.

DENMAN, J. The first question for our decision is, whether the decision in *Sheba Gold Mining Co.* v. *Trubshawe*, and *Ryley* v. *Master* (1), is applicable to such a case as the present. The action is brought to recover the principal and interest of two joint and several promissory notes drawn by two defendants in favour of one of the defendants and indorsed by him to the plaintiffs for value; the plaintiffs are therefore in the position of being holders of promissory notes (which are equivalent to bills of exchange under the provisions of the Bills of Exchange Act, 1882), which notes have been duly presented and dishonoured. The claim on the writ is for the amount of the notes, a small named sum for interest at 5 per cent. up to the date of the writ, and a general claim for interest at the same rate from the date of the writ to judgment; and it is to be remarked that this last-named claim for interest is not at a higher rate than the rate at which interest is claimed on the notes themselves. The learned judge at chambers thought the case distinguishable from *Sheba Gold Mining Co.* v. *Trubshawe*, and from *Ryley* v. *Master*. (1) A doubt has arisen whether the last-named case was not within the Bills of Exchange Act; but upon looking carefully at the facts of that case, I am of opinion that it did not fall within s. 57, which is the section relied on by the present plaintiffs, for that section does not seem to contain a description of any person applicable to the plaintiff in *Ryley* v. *Master* (1); that case is therefore no authority in the present case so far as regards the applicability of the Bills of Exchange Act.

We have to decide whether, notwithstanding the decision in *Sheba Gold Mining Co.* v. *Trubshawe* (1), the learned judge was right in giving the plaintiffs judgment for the amount of the notes, with interest at 5 per cent. to the date of the writ, and

(1) Ante, p. 674.

also with interest from the date of the writ to payment or judgment. That question depends on the meaning of s. 57 of the Act of 1882. The promissory notes were dishonoured bills within the meaning of that section, which provides for the measure of damages against parties to a dishonoured bill. Now, the measure of damages means the amount which the jury (or perhaps in certain cases the judge) would be competent to allow beyond the amount of the bill, and I read the provisions of that section with regard to the measure of damages (which are to be deemed to be liquidated damages) in the following way: the plaintiff may recover the amount of the bill, with interest on that amount at the rate agreed upon from presentment; and there is a further provision in sub-s. 3, that where interest may be recovered as damages (that is, as liquidated damages), the interest may, if justice requires it, be withheld wholly or in part, and that interest as damages may or may not be given at the same rate as interest proper. It is admitted that the object of the clause is to enable actions on bills of exchange to be easily dealt with under Order XIV., and it seems to me that the section may be worked consistently with the power of the judge under Order XIV. to settle all questions between the parties without the necessity of any inquiry before a jury. The principle laid down in *Sheba Gold Mining Co.* v. *Trubshawe* (1), and its companion case, is applicable to a different state of things to that contemplated by sub-s. 3, which may be so construed and worked as to consider interest up to payment or judgment as being in the nature of liquidated damages. It seems to me, too, that the interest contemplated by sub-s. 1 (*b*), is clearly interest up to the date of judgment; that is part of the measure of damages. Under sub-s. 3 it might be possible to hold that the power to withhold interest recoverable as liquidated damages is exercisable only by the tribunal which *at the trial* of the action has to give judgment, but I think it is more likely that the legislature meant to leave that question to the judge who might deal with the case under Order XIV., and not to leave it at large for the decision of another tribunal. The power is a wide one; interest "may," not "shall," be given; and under that power, if the

(1) Ante, p. 674.

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interest claimed were at so high a rate that the judge would not give it at that rate, he might give it for part of the time only, or at a less rate. There seems to me to be no difficulty in applying the section to such a case as the present, and I think that the decision of the learned judge must be upheld and the appeal dismissed.

A. L. SMITH, J. I am of the same opinion. The action is brought by indorsees against the makers of two promissory notes, of which the plaintiffs are the holders within the meaning of s. 57 of the Bills of Exchange Act, 1882, and the question is whether the writ is specially indorsed for the purposes of Order XIV. It is said that it is not, because it claims interest at 5 per cent. from date of writ to payment or judgment, and the authorities are said to be decisive. To me, however, they seem not to be so. In *Elliott* v. *Roberts* (1), Lord Coleridge, C.J., and Mathew, J., decided that a writ was not specially indorsed because the interest claimed was abnormal (the case, however, was but little argued). In *Blood* v. *Robinson* (2), Lord Coleridge, C.J., and Cave, J., held that a claim for the amount of a bill of exchange, for money paid, money lent, and interest, was a good special indorsement. These cases raised a doubt as to whether there had not been wrong decisions under Order XIV. at chambers, and at last two cases were argued before a Court composed of five judges. These cases (*Sheba Gold Mining Co.* v. *Trubshawe*, and *Ryley* v. *Master* (3)), decided that where a plaintiff has to resort to the provisions of 3 & 4 Wm. 4, c. 42, s. 28, in order to make a claim for interest by way of damages, he cannot make a good specially indorsed writ. They left untouched the present point upon s. 57 of the Bills of Exchange Act, 1882.

In this case the holder is suing the maker of two promissory notes, and he is directly within s. 57 of the Bills of Exchange Act, 1882. I cannot read that section without seeing that the legislature expressly intended that under it the provisions of Order XIV. should be applicable to bills of exchange and pro-

(1) 36 Sol. J. 92.

(2) 36 Sol. J. 203.

(3) Ante, p. 674.

missory notes. The provision "which shall be deemed to be liquidated damages," has been introduced because, without it, a defendant might have said that the cause of action was a breach of contract and that the damages were unliquidated. It is clear that the meaning of sub-s. 1 is that the amount of the bill, the interest, and the expenses of noting or protest, are all to be recovered as liquidated damages. It is argued that that does not cover interest down to judgment, but only interest to the date of the writ. Why should that be so? By Order XXXVI., r. 58, "where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment"—that is to say, down to the date of judgment; and if this provision be read with s. 57, interest allowed by law (that is, interest down to judgment) is recoverable as liquidated damages.

It is further to be observed, that under s. 57, sub-s. 2, where a bill has been dishonoured abroad, the holder may recover the amount of the re-exchange "with interest thereon until the time of payment," and there seems no reason or sense in providing that in the case of a bill dishonoured abroad a holder may recover interest down to payment; while, if it be dishonoured here, he can only recover interest down to the date of the writ. The whole intention of the Act seems to me to have been that the holder should get his interest down to judgment in one action, and should not be driven to a second action to recover the interest between writ and judgment.

As to the meaning of sub-s. 3, I entirely agree with my brother Denman: though the plaintiff may recover damages down to judgment, yet the tribunal (that is to say, the judge at chambers in cases under Order XIV.) need not give the amount of interest stipulated for or claimed.

Appeal dismissed.

Solicitors for plaintiffs: *Petch & Smurthwaite.*

Solicitors for defendants: *Indermaur & Brown.*

W. J. B.

C. A.
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April 4.

[IN THE COURT OF APPEAL.]

LAWRENCE & SONS *v.* WILLCOCKS.

Practice—Specially Indorsed Writ—Leave to Sign Judgment—Bill of Exchange—Claim for Noting and Interest—Order III., *r.* 6—*Order* XIV., *r.* 1—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 57.

The indorsement upon a writ of summons in an action on a bill of exchange contained a claim for expenses of noting and for interest at 5 per cent. from the date of the writ until payment:—

Held, that the writ was a specially indorsed writ within Order III., r. 6, by reason of the provision of the Bills of Exchange Act, 1882, s. 57, which declares that such expenses and interest shall be deemed to be liquidated damages; and therefore that leave could be given to enter judgment upon such a writ under Order XIV., r. 1.

APPEAL from an order of the Queen's Bench Division, affirming an order made at chambers under Order XIV., r. 1, giving leave to the plaintiffs to sign judgment for the amount claimed by the indorsement on the writ.

The action was on a bill of exchange by indorsees against acceptor. The indorsement on the writ was as follows: "The plaintiffs' claim is 20*l.* 17*s.* 8*d.* principal, noting, and interest on the defendant's dishonoured acceptance. Particulars: 1891. Nov. 21. To amount of bill of exchange, dated June 18, 1891, due this day, accepted by the defendant in favour of Chudleigh Brothers, and by them indorsed to the plaintiffs for full value and consideration, 20*l.* 10*s.* To noting and interest thereon to date, 7*s.* 8*d.* Total, 20*l.* 17*s.* 8*d.* The plaintiffs also claim interest on 20*l.* 10*s.* of the above sum at 5*l.* per cent. from date hereof, until payment."

It was contended for the defendant before the Divisional Court that the writ was not a specially indorsed writ within Order III., r. 6, and therefore Order XIV., r. 1, did not apply. The Court (Denman and A. L. Smith, JJ.), held that the writ was specially indorsed, and affirmed the decision of the judge at chambers. The defendant appealed.

Herbert Reed, and *Bonner*, for the defendant. This case is governed by *Wilks* v. *Wood*. (1) This cannot be a specially

(1) Ante, p. 684.

indorsed writ within Order III., r. 6, because the rate of interest is not ascertained. Order III., r. 6, only allows a special indorsement when the demand is altogether liquidated. Prior to the Bills of Exchange Act, 1882, interest on a bill of exchange, where the bill did not provide for interest, could only be recovered as damages. In *Cameron* v. *Smith* (1), Bayley, J., says, "Although by the usage of trade, interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury in order that they may find the amount; and it is competent for them either to allow five per cent. or four per cent., according to their judgment of the value of money, or they may even allow nothing, in case they are of opinion that the delay of payment has been occasioned by the default of the holder." The Bills of Exchange Act, 1882, s. 57 (3), is to the same effect, and it is submitted that the Act leaves the law precisely as it was before in this respect.

The judge cannot, under Order XIV., r. 1, take upon himself the functions of the jury and assess the damages which he must do if that order applies in such a case as this. It is uncertain till the case comes before the jury whether any interest will be payable or not. The amount cannot be liquidated by the mere act of the plaintiffs in claiming interest at a certain rate. If this is a specially indorsed writ, an exorbitant amount might be indorsed for interest, and then, if the defendant did not appear, judgment might be signed for it.

The Bills of Exchange Act, s. 57, says no doubt that the interest is to be "deemed to be liquidated damages," but that provision cannot have been intended to affect the present question. The words may have been inserted to negative any suggestion that it was in the nature of a penalty. The whole scope of Order XIV. and Order III., r. 6, only applies to an ascertained sum, and words of this kind cannot make that ascertained which is in reality not ascertained. In the case of *London and Universal Bank* v. *Lord Clancarty* (2), the Court decided that a writ such as this is specially indorsed. In *Elliott* v. *Roberts* (3), however, the Lord Chief Justice and Mathew, J., seem to have

(1) 2 B. & A. 305.

(2) Ante, p. 689.

(3) 36 Sol. J. 92.

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held the contrary. They also cited *Blood* v. *Robinson* (1); *Rodway* v. *Lucas* (2); *Sheba Gold Mining Co.* v. *Trubshawe* (3).

English Harrison, for the plaintiffs. The answer to the argument that there might be hardship in case of default of appearance is that, if a defendant does not choose to appear, it is his own fault.

In *Elliott* v. *Roberts* (4), the claim for interest was exorbitant, and the Court thought that it required to be inquired into; and it was really for that reason they would not allow judgment to be signed. [He was then stopped by the Court.]

LORD ESHER, M.R. In this case the claim indorsed on the writ is for the amount of a bill of exchange, 20*l.* 10*s.*, for the expenses of noting and interest to date, 7*s.* 8*d.*, and for interest at 5*l.* per cent. from the date of the writ till payment. It is argued that this is not a specially indorsed writ under Order III., r. 6. That rule says that, in all actions where the plaintiff seeks only to recover a debt or liquidated demand in money, with or without interest, arising in certain modes specified among which is a bill of exchange, the writ may be specially indorsed. The question is whether the demand here is a liquidated demand in money. The demand for the amount of the bill clearly is such a demand. The question is whether the claim for expenses of noting and interest is so also. It is said that the jury might refuse to allow the 5 per cent. interest claimed subsequent to the date of the writ, or so much of the 7*s.* 8*d.* as represents interest; and, therefore, the demand for interest is not liquidated. I do not think that we need inquire whether it is so, strictly speaking, or not. The demand is made in respect of a dishonoured bill of exchange, and it seems to me that the question turns wholly on the 57th section of the Bills of Exchange Act, 1882. That section provides that "where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an

(1) 36 Sol. J. 203.
(2) 10 Ex. 667.
(3) Ante, p. 674.
(4) 36 Sol. J. 92.

indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser (*a*) the amount of the bill." It cannot be said, therefore, that damages cannot form part of the demand on the bill, because the amount of the bill itself is included in the measure of damages provided for by the section. Then the section goes on to provide for the recovery of "(*b*) interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case: (*c*) the expenses of noting, or, where protest is necessary and the protest has been extended, the expenses of protest." Then sub-s. 3 provides that "where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper." The general effect is that the measure of damages is to be all those things mentioned, all of which are "to be deemed to be liquidated damages." That means that they are to be deemed to be so, whether they are so or not. Therefore, in applying Order XIV., r. 1, to such a case, the Court is to deem that all those things when demanded are liquidated damages. If so, the demand for them is a liquidated demand. It follows that this writ is specially indorsed within the meaning of Order III., r. 6, and Order XIV. is applicable. It was said that the result is to give power to the master or judge at chambers to assess damages. But there is really nothing in that argument. What the master or judge at chambers has to do is to consider whether he will allow judgment to be signed or not for the amount of the claim. If he thinks the amount indorsed for interest fair and reasonable, he will allow judgment to be signed; if he thinks it unfair and unreasonable, and that it would not be recovered at the trial, he will refuse leave to sign judgment. If he decides wrongly, there is an appeal from his decision. Therefore I do not see any hardship in that respect. Then it was further suggested as a matter of hardship that, if such a writ as this is a specially indorsed writ, such a writ might be indorsed with an exorbitant claim for interest, and then, if the defendant did not appear, judgment

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might be signed against him for such claim. If that is so, where is the hardship? The defendant might have appeared, and, by not doing so, is in default; and, even then, if he could shew any reasonable excuse for such default, the Court would set aside the judgment and let him in to defend on terms. But whether there is any hardship or not is really immaterial, for we are bound by the express provisions of the Bills of Exchange Act. With regard to the cases that have been cited from the *Solicitors' Journal*, I doubt whether the reports can be quite accurate, and I do not think it likely that the Lord Chief Justice could have contradicted himself, as it would appear he did, if the decision in *Elliott* v. *Roberts* (1) was as suggested.

FRY, L.J. I am of the same opinion. The question we have to determine is, whether the plaintiffs in the present action are seeking only to recover a liquidated demand in money payable by the defendant on a bill of exchange, for if so, the case is within Order III., r. 6. It appears to me that this question is entirely determined by the 57th section of the Bills of Exchange Act. The plaintiffs are seeking to recover three things: the amount of the bill; the expenses of noting; a sum of money for interest. The section says that all these things may be recovered, and shall be deemed to be liquidated damages. It has, in effect, said that each of them shall be deemed to be a liquidated demand. The statute having said that, there is an end of the case. It was argued that that could not be the meaning of the section, because the amount of the interest is not assessed, and the section gives power to the jury to refuse to allow the interest claimed. That is true, but the legislature has nevertheless said that it is to be deemed to be liquidated damages. We are bound to give the words of the section their natural meaning, unless some absurdity or injustice arises. What, then, is the result of what we are holding? It seems to me that it is very beneficial that the holder of a bill of exchange should be enabled to recover interest together with the principal summarily under Order XIV. It was argued that a difficulty arose, because the section contemplates that the jury

(1) 36 Sol. J. 92.

shall assess the interest, and a master or judge at chambers has no power to do so. But he can decide whether the claim is to go before a jury or not. If he thinks that the interest claimed is excessive, he will refuse to give leave to sign judgment. If it appears to be reasonable, then it is right that judgment should be signed. There is nothing in the suggestion that judgment could be signed for the amount of an exorbitant claim for interest in default of appearance, because the same difficulty arises in the case of a liquidated demand, whether the writ is specially indorsed or not. The point does not really arise in this case. So much for the matter in point of principle. With regard to the authorities, the case of *Elliott* v. *Roberts* (1) was cited to us. I do not think that the Court can have meant to decide in that case that the demand for interest was not a liquidated demand, because in the subsequent case of *Blood* v. *Robinson* (2), decided shortly afterwards, the Lord Chief Justice seems to have agreed in a decision the other way. I think the decision in *Elliott* v. *Roberts* (1) must really have turned on the fact that the demand for interest was exorbitant, and therefore the Court did not think that the plaintiffs ought to have leave to sign judgment. It does not seem to me that there is any authority which stands in the way of the decision we are giving.

LOPES, L.J. I agree. I think that s. 57 of the Bills of Exchange Act is an answer to this appeal. That section gives the measure of the damages that may be recovered on the dishonour of a bill, and provides that such damages shall be deemed to be liquidated damages. I understand that to mean that, whether the matters specified are strictly speaking liquidated damages or not, for the purposes of the Act they are to be considered to be so. It was argued that the result of so holding would be hardship. It was said that an exorbitant claim for interest might be made, and the result of holding this to be a specially indorsed writ would be to substitute the master or judge at chambers for the jury who alone have power to assess the interest. There is really nothing in that, because when

(1) 36 Sol. J. 92. (2) 36 Sol. J. 203.

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LOPES, L.J.

the master or judge sees that the claim is exorbitant, he has a discretion, and will say that the interest is such as ought not to be given, and therefore leave to sign judgment ought not to be granted, and the case must go for trial. Then it was said that exorbitant interest might be claimed, and, if the defendant did not appear, judgment might be signed, and hardship might be thus occasioned. But the argument fails, inasmuch as the same hardship would occur where there was a liquidated demand which was not specially indorsed; because it is provided by Order XIII., rule 3, that where the writ is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails to appear, judgment may be signed. Moreover, if the defendant does not choose to appear, he adopts that course at his own risk, and there is really no hardship in the case. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitor for the plaintiffs: *W. F. Stokes.*
Solicitor for the defendant: *E. J. Moeran.*

E. L.

C. A. 1892 *March 5.*

[IN THE COURT OF APPEAL.]

CROCKER *v.* KNIGHT.

Trade Union—Member—Funeral Benefit Money—Nominee for Payment—Right to sue—Jurisdiction—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 4, *sub-s.* 3 (*a*); *Trade Union Act Amendment Act*, 1876 (39 & 40 *Vict. c.* 22), *ss.* 1, 10.

By the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, no Court is to entertain any legal proceeding to enforce (sub-s. 3.) "any agreement for the application of the funds of a trade union—(*a*) To provide benefits for members." By 39 & 40 Vict. c. 22 (which is to be construed as one act with the Trade Union Act, 1871), it is by s. 10 provided that a member of a trade union, not being under the age of sixteen years, may, by writing, nominate a person to whom any moneys payable on the death of such member, not exceeding 50*l.*, shall be paid; and that, on receiving proof of the death of a nominator, the trade union "shall pay to the nominee the amount due to the deceased member," not exceeding the sum aforesaid:—

Held, that there was nothing in the later Act to shew that it was intended to repeal the provisions in s. 4 of the earlier Act, and that consequently no

action could be maintained against a trade union by the nominee of a deceased member to recover a sum of money to which, under the rules of the trade union, the member or his nominee had become entitled to receive from the funds of the union.

APPEAL from an order of the Queen's Bench Division, upon an application for a prohibition to the county court of Monmouth, to stay proceedings in an action for money alleged to be due by a trade union to the nominee of a deceased member.

The United Society of Boiler Makers and Iron and Steel Ship Builders is a trade union which was formed in 1834, and was afterwards registered under the Trade Union Act, 1871. By the rules, as revised in 1890, regulating the society, it is provided (r. 31), under the head of "Funeral Benefit," that, at the death of a member, the society shall pay "the nominee, or other person entitled, the sum of 12*l.*"; and that "any member may nominate any person to receive his funeral money, in accordance with the 10th clause of the Trade Union Act (1871) Amendment Act." By the rules the executive council were empowered, but not required, to determine any question submitted to them by any branch.

George P. Williams, a member of the society, died in May, 1891, having made a will appointing the plaintiff his executrix, and nominating her to receive his funeral money from the society.

The plaintiff then applied to the branch of the society at Newport, Monmouthshire, for payment of the 12*l.* funeral money; but the branch disputed the plaintiff's claim; whereupon she brought an action in the county court of Monmouth, holden at Newport, against the society, by its secretary, for payment to her of the money to which she claimed to be entitled as Williams's executrix and nominee.

At the trial of the action it was admitted that Williams had been a member of the society, and that 12*l.* was the amount due, if anything, and the county court judge gave judgment for that amount, with costs, overruling an objection taken on behalf of the defendant that, under s. 4, sub-s. 3 (*a*), of the Trade Union Act, 1871 (34 & 35 Vict. c. 31), there was no jurisdiction to entertain the action.

An application subsequently made by the defendant in

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chambers for a writ of prohibition to restrain all proceedings in the action was dismissed by Charles, J.

The defendant appealed to the Divisional Court (Lawrance and Wright, JJ.), who, on January 27, 1892, set aside the order of Charles, J., and ordered a writ of prohibition to issue.

The plaintiff appealed to the Court of Appeal.

Bailhache, for the plaintiff. The question turns on two sections which are, no doubt, to some extent, contradictory. By the Trade Union Act, 1871 (34 & 35 Vict. c. 31), trade unions were, for the first time, legalized for certain purposes, and sect. 4 enacts that "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements," including (sub-s. 3) "any agreement for the application of the funds of a trade union—(*a*) To provide benefits to members." The "funeral benefit" of 12*l.* in question in this case is undoubtedly a "benefit to a member" within that section; and, therefore, if the section stood alone, the trade union could not be sued for the money. But the subsequent Act, the Trade Union Act Amendment Act, 1876, provides, in s. 10, that "a member of a trade union, not being under the age of sixteen years, may, by writing under his hand . . . . nominate any person . . . . to whom any moneys payable on the death of such member, not exceeding 50*l.*, shall be paid at his decease . . . . and on receiving satisfactory proof of the death of a nominator, the trade union shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid." The terms of that section are precise—that on the death of a member the trade union "shall pay to the nominee" the sum due to the deceased member. A liability is, therefore, created on the part of the trade union to pay, entitling the nominee to sue, and thus the county court judge rightly held that he had jurisdiction to entertain the action. The section in the earlier Act must give way to the section in the later. The object of the later section is to save taking out administration to the estate of a deceased member. In *Wolfe* v. *Matthews* (1), Fry, J., gave a

(1) 21 Ch. D. 194.

narrow interpretation to s. 4 of the Act of 1871, holding that it did not prohibit an action for an injunction to restrain a tradesman from applying the funds contrary to an agreement for providing benefits to members. The section is a negative, not an affirmative, enactment, and merely leaves a trade union, as regards the matters therein mentioned, in the same position as it was before the Act; whereas, s. 10 of the Act of 1876 is an affirmative section, positive and precise in its terms. The course of modern legislation is to bring trade unions more and more under the jurisdiction of the Courts, as illustrated by the case of *Gibson* v. *Lawson*. (1) It is only reasonable that after the death of a member his nominee should have remedies which the deceased member might not himself have had. Where in an amending Act a provision is found differing from the principal Act, it is the principal, and not the amending Act, that must give way. If the case had arisen under the Friendly Societies Act, 1875, it would be clear. That Act provides (s. 22) for the settlement of disputes between members and the society by arbitration and by proceedings in the county court; but here any arbitration is, by the rules, only optional; so that, apart from the Act of 1876, the plaintiff has no remedy.

Bosanquet, Q.C., and *E. U. Bullen*, for the defendant, the secretary of the trade union, were not called upon.

LINDLEY, L.J. The question we have to consider is, whether the county court had jurisdiction to entertain this claim. The claim is for 12*l.* alleged to be due to the plaintiff as the nominee of a deceased member of a trade union.

A trade union is a legal body; there can be no doubt about that after the Trade Union Act of 1871. But, notwithstanding that it is legal, certain actions cannot be maintained against its officers, and our attention has been called to s. 4 of the Act of 1871, and to s. 10 of the Amendment Act of 1876.

By s. 1 of the Act of 1876 it is enacted that, "This Act and the Trade Union Act, 1871, hereinafter termed the principal Act, shall be construed as one Act, and may be cited together as the 'Trade Union Acts, 1871 and 1876,' and this Act may be

(1) [1891] 2 Q. B. 545, 559.

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cited separately as the 'Trade Union Act Amendment Act, 1876.'" Thus we are to look at the two Acts; and it is clear, therefore, that the object of the second is not to repeal the first, although it may contain sections so opposed to sections in the first as to repeal those sections by necessary inference.

The Act of 1871 by s. 3 enacts that "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." That is a section, therefore, which sanctions any agreement or trust entered into by a trade union, although the purposes of the trade union may be in restraint of trade. But, then, s. 4 says this: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements." Pausing there, the language of the section is peculiar. It is a prohibition against any Court entertaining any legal proceedings for the purpose of enforcing certain agreements; and among those agreements is this, in sub-s. 3: "Any agreement for the application of the funds of a trade union—(*a*) To provide benefits to members."

Now, the sum sought to be recovered here is payable under one of the rules of a trade union upon the death of a member; and certainly that is a rule which provides a benefit to the member within s. 4, though he may be dead; for he is entitled to appoint some one to receive a sum of money derivable under such benefit.

So far, therefore, this action cannot be maintained; but s. 10 of the Act of 1876 runs thus: "A member of a trade union not being under the age of sixteen years may, by writing under his hand . . . . nominate any person . . . . to whom any moneys payable on the death of such member not exceeding fifty pounds shall be paid at his decease . . . . and on receiving satisfactory proof of the death of a nominator, the trade union shall pay to the nominee the amount due to the deceased member not exceeding the sum aforesaid."

Now, that section, standing alone, and without looking at the foregoing section in the Act of 1871, is in terms one which seems to impose a statutory obligation on the trade union to pay

to the nominee the amount to which the member was entitled under the rules. The question is whether the words "the trade union shall pay" constitute an obligation which can be enforced by action. Now, I think the object of this section was not to depart from the policy of the earlier Act, but was entirely different, namely, to enable persons of sixteen years of age and upwards, without the necessity of making a will and incurring the expense of probate, to give away any small sums of money that may be due to them from the trade union. Under the section the money receivable by a member from the trade union is to go to the nominee of that member even though he may have been so young as seventeen or eighteen years of age; and I do not think, looking at the first and other sections of that Act, that we can find any sufficient indication of an intention to depart from the terms of s. 4 of the first Act so as to alter the policy of the legislature, which was to prevent the introduction of legal proceedings into the affairs of trade unions, and to save trade unions from being subjected to the expense of litigation.

The question really turns on the construction of the two Acts. We are asked to read s. 10 of the second Act as overriding s. 4 of the first, and to hold that there is, therefore, a distinct statutory obligation on the part of the trade union to pay; but when we are told by the legislature to read the two Acts as one, we must read them in such a way as to make them consistent. In my opinion, the trade union is subject to no more obligation to pay than it was before the Act of 1871 was passed. Sect. 4 is clear: no action shall be brought for any such sum of money as is sought to be recovered here.

In my opinion, the decision of the Divisional Court was right, and the appeal must be dismissed with costs.

KAY, L.J. I am of the same opinion. I think it is quite clear that under the Act of 1871, neither an executor nor an administrator of a deceased member could have maintained an action against the trade union for money due under any agreement between the deceased member and the trade union; for s. 4 of the Act of 1871 says expressly that "nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the

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object of directly enforcing or recovering damages for the breach of any of the following agreements"—specifying them; and that a trade union would have been an illegal association before that Act is also clear; so that before that Act an action against a trade union could not have been maintained. Then, reading this Act together with the Act of 1876, which we are directed to do by s. 1 of the latter Act, that is, construing the two Acts as one—we are to see whether s. 10 of the Act of 1876 contains anything which, in its intent and purport, repeals the general provision in s. 4 of the Act of 1871. I cannot find anything in s. 10 which does so. The only object, in my opinion, of s. 10 is this: it recognises that a sum of money may be payable to a member of a trade union or to his representatives at his death, and he is given a power, although he may be an infant sixteen years of age or upwards, to nominate some one to receive the money, and thus, where he dies without, as often happens, leaving any estate which would make it worth while to take out administration, to avoid the necessity and prevent the expense, delay, and trouble of taking out administration. The money is a debt which could not be recovered by the executor or administrator of the deceased member if he had one; so the legislature has given this power to a member, including an infant member, to nominate a person to receive the money due to him, and has given this direction to the trade union to pay the nominee. I agree that, if it had not been for s. 4 of the Act of 1871, s. 10 of the Act of 1876 would have enabled the person nominated by the member to sue for the money; but, in my opinion, this section is not inconsistent with s. 4. If s. 10 had meant to repeal the previous section, I should have expected to find in it some such words as, "notwithstanding anything contained in s. 4 of the principal Act, such nominee shall be entitled to sue." Not finding any such words, it would be an extraordinary construction of this section to say that, although the member cannot sue, or his executor or administrator cannot sue, yet the nominee of the member—that is, a person brought into the matter by the legislature, evidently to avoid the expense of probate—shall have power to put the trade union to the expense of an action. I am convinced that

this is not the meaning of s. 10. I think that s. 4 applies as much to a nominee as to an executor or administrator of a member, and that the section is intended, like the corresponding provisions of the Friendly Societies Act, to prevent a trade union, so far as it is a benefit society, from being subjected to the expense and trouble of litigation by its members. It is true that there is no provision for arbitration; but still the members of the trade union can, it seems, arbitrate if they like, under their rules; but, whether that be so or not, I think s. 4 is intended to prohibit the very kind of litigation we have in this case.

In my opinion, the Divisional Court was right, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Warriner & Kinch, for Llewellyn & Moore, Newport Mon.; Darby & Cumberland, for Clifton, Carter & Co., Bristol.*

G. I. F. C.

HARDCASTLE *v.* BIELBY.

1892 *Feb.* 17.

Highway—Surveyor of Highways—Liability of Surveyor of Highways "for laying or causing to be laid" Stone on the Highway "and allowing the same to remain there at night"—Mens rea—Highways Act (5 & 6 *Wm.* 4, *c.* 50), *s.* 56.

By the Highways Act (5 & 6 Wm. 4, c. 50), s. 56, "If any surveyor or district surveyor shall lay or cause to be laid any heap of stone or any other matter or thing whatsoever upon any highway, and allow the same to remain there at night to the danger or personal damage of any person passing thereon, all due and reasonable precaution not having been taken by the said surveyor to guard against the same, he shall forfeit for every such offence any sum not exceeding five pounds."

A cart was injured through contact with a heap of stone which had been allowed to remain after nightfall upon a highway. The stone had been laid there by a carter who acted under the orders of a person to whom the surveyor had given general directions as to repairing the road; but the surveyor did not himself know that the stone had been laid on the road:—

Held, that the facts did not shew any evidence of an offence by the surveyor within the meaning of the section.

CASE stated by justices for the West Riding of Yorkshire on the appeal of John Hardcastle, surveyor of highways to the Handsworth Local Board, against a conviction for "causing a

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heap of stone to be laid upon a highway and allowing the same to remain there at night," contrary to the Highways Act (5 & 6 Wm. 4, c. 50), s. 56. (1)

It appeared that on November 4, 1891, a carter, acting under the orders of a person to whom the appellant had given general directions as to repairing the highway in question, and who was mentioned in the case as the appellant's "foreman," placed two loads of stone in heaps upon the road, and that at about seven in the evening a cart came into contact with some of the stone and was injured. It was admitted that the carter who placed the stone upon the road had seen a paper signed by the appellant containing a direction that materials for repair were not to be placed "so as to cause obstruction of the road," and that the appellant did not himself know that the stone had been placed upon the road. The question which the case purported to submit for decision was whether or not a surveyor could be convicted under the section, "apart from personal knowledge of the act of his 'foreman,' in directing the stone to be laid on the road and allowing it to remain there at night."

R. M. Bray, for the appellant. The conviction cannot be supported. The language of the section in no way suggests that the statutory misdemeanour can be committed without a guilty intention. There is no evidence that the surveyor either "caused the heap to be laid" on the highway or "allowed it to remain there at night." The case shews that he did not even know that it had been left on the highway at all. In addition, the person who directed the carter was in all likelihood not the appellant's servant. Blackburn, J., in *Foreman* v. *Mayor of Canterbury* (2), says, "In fact and in practice the surveyor never is the master of the persons who are employed on the roads."

(1) By the Highways Act (5 & 6 Wm. 4, c. 50), s. 56, "If any surveyor or district surveyor shall lay or cause to be laid any heap of stone or any other matter or thing whatsoever upon any highway, and allow the same to remain there at night to the danger or personal damage of any person passing thereon, all due and reasonable precaution not having been taken by the said surveyor to guard against the same, he shall forfeit for every such offence any sum not exceeding five pounds."

(2) Law Rep. 6 Q. B. 214.

Asquith, Q.C. (*C. M. Atkinson*, with him), in support of the conviction. If the Court decides that the statutory misdemeanour cannot be committed except where the surveyor personally superintends the repairs of the roads, the section will be rendered practically inoperative. It is suggested that the case is analogous to *Bond* v. *Evans* (1), in which a publican was held to have been properly convicted under s. 17 of the Licensing Act, 1872, of having "suffered" cards to be played in his tavern, though he did not himself know that the game was taking place. The section is one of a group of sections, ss. 51 to 57, which empower surveyors to gather, under strict conditions, stones for repairs. The object of the penalties imposed by ss. 55, 56, and 57 is the protection of the public against arbitrary or negligent conduct by surveyors in the discharge of this function. It is to be observed that these sections do not, like s. 72, contain the word "wilfully." The meaning of s. 56 appears to be, that where a complainant proves that a dangerous heap of stones has been left on a highway at night, a presumption of negligence arises against the surveyor for the district, and he is primâ facie liable to be fined; but he may rebut this presumption and escape being fined if he proves that he has taken "all due and reasonable precaution" as directed in the section.

Bray, in reply.

HAWKINS, J. I need not express an opinion upon the abstract problem which we are invited to solve. I can conceive circumstances under which a surveyor might be liable to a penalty under the section for having left stones on the highway at night, although there was no evidence that he personally knew that they had been left there. Whether he would or would not be so liable in any particular case must depend upon the course of business as between the surveyor, the district board, and the men employed to mend the roads. But in the present case there is no evidence that the appellant either "caused the stones to be laid on the highway" or "allowed them to remain at night upon the highway" so as to cause danger. The person who gave orders to the carter when cross-examined said, "Hardcastle knew

(1) 21 Q. B. D. 249.

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nothing about it," and there is nothing to shew that he knew that they were on the road at all. The real offence is no doubt the allowing the heap to remain on the highway at night without taking "all due and reasonable precaution." But how can a man take "all due and reasonable precaution" to prevent a heap of stones on a highway at night doing damage, unless the man knows that the heap of stones is lying there upon the highway in such a position as to cause danger? If the appellant had been on the spot and had seen the dangerous heap lying on the road, and had then taken no pains to give warning of the danger, it might perhaps have been said that by his silence he had "allowed" the dangerous heap to lie there. But as it is clear that he did not know that the heap was there at all, I do not think that he can be said to have "allowed" it to remain there. The conviction ought, therefore, in my opinion, to be quashed. My judgment has no general application, but is confined to the circumstances of this particular case.

COLLINS, J. I am of the same opinion. The appellant is charged with two offences, first, "with having caused a heap of stones to be laid upon the highway"; secondly, with having "allowed" the heap "to remain there at night to the danger or personal damage" of the person whose cart was injured through contact with the heap.

It is a general principle of law that a man is not liable to be indicted criminally for the act of his servant: see *Woodgate* v. *Knatchbull* (1), per Ashurst, J.; but a particular statute may impose this liability upon him by its express terms or by implication. As regards the first offence, I see nothing in the terms of the section to indicate that it can be committed unless the laying of the stones upon the highway is proved to have been in some sort the act of the surveyor. There must be evidence that the stones were laid upon the highway by his authority. As to the second offence, there is rather more difficulty. The word "allow" seems to admit the consideration whether or not the offence can be committed where negligence on the part of the surveyor has been proved, although he may not have been proved

(1) 2 T. R. 148.

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to have any personal knowledge that the acts which have caused the injury have taken place. It is unnecessary, however, to decide this question, because in this case there is absolutely no evidence of negligence on the part of the surveyor. It would be monstrous to hold that a man may be fined under the statute because an accident has happened, which it was impossible for him to prevent for the simple reason that it was impossible for him to find out that the circumstances which led to the accident had occurred, and therefore impossible for him to take the precautions which are enjoined upon him by the statute. Any one would shrink from construing a statute in such a way as to make such a conviction possible. Further, as was pointed out, it may well be that the person who gave orders to the carter was himself not the servant of the surveyor. I think that no case has been made out under the section.

Conviction quashed.

Solicitor for the appellant: *D. Muir Wilson, Sheffield.*

Solicitors for the respondent: *Badham & Williams, for Williams & Edwards, Wakefield.*

H. D. W.

THE REVEREND F. J. WOOD AND OTHERS *v.* THE BURIAL BOARD FOR THE DISTRICT OF THE TOWNSHIP OF HEADINGLEY-CUM-BURLEY.

1892 *Jan.* 14, 15.

Burial—Burial Board—Cemetery—Rights of Incumbents of Parishes in Burial District—Burial Fees—Interment of Strangers—Grants of Exclusive Rights of Interment—Notice to Incumbent that Burial is about to take place—Performance of Religious Service by Person not in Orders or not authorized by Incumbent—15 & 16 *Vict. c.* 85, *ss.* 30, 32—43 & 44 *Vict. c.* 41, *ss.* 1, 5.

By 15 & 16 Vict. c. 85, s. 32, after the consecration of any burial-ground provided under the Act—such burial-ground shall be deemed the burial-ground of the parish for which the same is provided, and where the same is provided for two or more parishes, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish; and every incumbent or minister of the parish or of each of the parishes (as the case may be) for which such burial-ground is provided shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorize, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground, or in the consecrated portion thereof, of the remains of parishioners or

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inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received . . . as if such burial-ground were the burial-ground of the respective parish of such incumbent or minister . . . and the parishioners and inhabitants of such parish or of each of such parishes shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial-ground or burial-grounds in and for their respective parish.

By the Burial Laws Amendment Act 1880 (43 & 44 Vict. c. 41), s. 1, notice may be given to the incumbent or officiating minister of any parish or ecclesiastical district or place that the burial of a deceased person will take place in the churchyard or graveyard without the rites of the Church of England.

Held, first, that where a parish is comprised in the district of a burial board formed under 15 & 16 Vict. c. 85 (as extended by 16 & 17 Vict. c. 134), and a cemetery provided by such board is the burial-ground of the parish, sect. 32 of 15 & 16 Vict. c. 85, gives to the incumbent of such parish no right to fees in respect of the burial in the consecrated portion of such cemetery of a deceased parishioner or inhabitant of the parish, if the incumbent, by reason of his not having received notice of the burial, was not present thereat to perform the burial service; and there is no obligation upon such board to give notice to the incumbent in question that such burial is about to take place.

Secondly, that the incumbents of parishes or ecclesiastical districts comprised in a burial board district have the same rights quoad sacra only in the cemetery as they would have had in the churchyards of their parishes or districts; and have, therefore, no right to fees in respect of interments in the cemetery of persons who are not parishioners or inhabitants of such parishes or districts, and have no right to fees in respect of grants of vaults or of exclusive rights of interment in such cemetery.

Thirdly, that there is no obligation upon a burial board to cause the notice required by the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 1, to be given to an incumbent before such board permits a burial to take place in the consecrated portion of their cemetery without the performance of the burial service according to the rites of the Church of England.

Apart from the provisions of the Burial Laws Amendment Act, 1880, a person commits an ecclesiastical offence if not being in orders, or not being authorized in that behalf by the incumbent of the parish, he conducts a religious service at a burial in the consecrated portion of a cemetery which is the burial-ground of such parish. It is, therefore, an illegal act on the part of a burial board to knowingly permit such unqualified or unauthorized person so to act.

SPECIAL CASE stated pursuant to Order XXXIV., r. 1.

The action was brought against the Headingley Burial Board for a declaration that the plaintiffs, who were incumbents of parishes or districts within the district of the defendants, were entitled to perform the duties, and to have the rights and authorities incident to such duties for the performance of religious services on

all burials in the consecrated portion of the defendants' burial-ground, called Lawnswood Cemetery, and in particular on the burials therein of the inhabitants of the plaintiffs' several parishes or districts, and to receive the fees in respect thereof, and in respect of grants of exclusive rights of burial, or of constructing vaults or places of burial therein with the exclusive right of burial, and in respect of monuments, gravestones, tablets, and monumental inscriptions erected therein, and in particular those respectively granted to or erected over such inhabitants, and to recover fees and payments received by the defendants in respect thereof.

The facts, so far as material for the purposes of this report, and the contentions of the parties appear from the hereunder mentioned paragraphs of the special case.

1. The township of Headingley-cum-Burley forms a part of the ancient ecclesiastical parish of Leeds.

2. Up to the time of the making of the first of the Orders in Council hereinafter mentioned, the said township formed one parochial chapelry, which had existed from time immemorial, and which still continues, except so far as it may have been affected by the formation of the districts hereinafter mentioned.

3. The church of St. Michael, Headingley, was the parochial chapel of the said chapelry, belonging to which there was an ancient burial-ground, in which from time immemorial the remains of the inhabitants of the said chapelry had been and were of right entitled to be buried, and for burials in the said burial-ground, and for the grants of exclusive rights of burial, and constructing vaults with the exclusive right of burial, and for the erection of monuments and inscriptions therein, and in the said church, fees had by custom always been paid to the incumbent thereof.

4–8. Under the provisions of various Orders in Council, made pursuant to the provisions of the various statutes in that behalf, portions of the said township of Headingley-cum-Burley were from time to time divided respectively from the said chapelry, and were formed, together with portions of other townships or parishes, into separate districts for spiritual purposes. In 1849 a portion of the said township was assigned as a district to the

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church of St. Matthias Burley. In 1866 a further portion was assigned as a district to the church of St. Augustine Wrangthorn. And in 1887 a portion of the above district assigned to St. Matthias, Burley, was divided therefrom, and, together with a portion of another township, was constituted a separate district for spiritual purposes and assigned to the church of All Hallows. No burial-grounds have ever been provided for either of the districts of St. Matthias Burley, St. Augustine Wrangthorn, or All Hallows

9. The said church of St. Michael, and the burial-ground attached thereto, are situate in the part of the said chapelry and township not dealt with by any of the above Orders in Council, and are referred to hereafter as the present chapelry district of St. Michael.

10. The plaintiff, the Rev. F. J. Wood, was the incumbent of St. Michael's, Headingley. The other plaintiffs were the incumbents respectively of St. Matthias Burley, St. Augustine Wrangthorn, and All Hallows.

11. In 1869 the defendant burial board was formed, pursuant to the statutes in that behalf, for the district of the township of Headingley-cum-Burley, and subsequently, under the provisions of the various statutes relating to the burial of the dead, there was duly provided out of the rates paid by the inhabitants of such parts of the several districts of St. Michael, Headingley, St. Matthias Burley, St. Augustine Wrangthorn, and All Hallows, as were within the said township, a burial-ground called Lawnswood Cemetery. A portion of the said cemetery, with a chapel erected thereon, was duly consecrated, and thereupon became the burial-ground for the places included in the said cemetery district.

12. By an Order in Council, made in 1873, it was ordered that (with certain exceptions not material) burials should be discontinued in the said church of St. Michael, and in the ancient burial-ground attached thereto.

14. Since the making of the Orders in Council constituting the said districts of Burley and Wrangthorn, the remains of the inhabitants of the said district of Burley (as it then existed), and of such part of the said districts of Wrangthorn and All Hallows as lie within the township of Headingley-cum-Burley,

continued to be buried in the ancient burial-ground attached to St. Michael's Church until the same was closed, and all fees in respect thereof, and in respect of monuments and inscriptions connected therewith, were paid to the incumbent of St. Michael for the time being, and all fees in respect of such burials therein as are still permitted have been paid to him.

15. The inhabitants of the present chapelry district of St. Michael continued down to the time of the closing of the said ancient burial-ground by the said Order in Council, and so far as burials therein are still permitted by the said Order, still continue to be buried in the said ancient burial-ground of St. Michael, and the fees in respect thereof, and also in respect of the burial in the said ancient burial-ground of any others not being such inhabitants, were always accustomed to be and are received by the incumbent of St. Michael's.

16. The fees accustomed to be paid and received in respect of burials in the said ancient burial-ground of St. Michael as aforesaid were and are in respect of—(*a*) the performance of the burial service; (*b*) vaults, and breaking the ground for interments; (*c*) for monuments and inscriptions. (1)

17. Part of the said burial-ground so provided by the board was with the chapel thereon consecrated as above stated, and the remainder on which there is also a chapel still remains unconsecrated. The board have permitted in both parts thereof the burial of the remains of the inhabitants of their said district within the township of Headingley-cum-Burley as aforesaid, and also of persons not resident within such district, and have granted for money payments to inhabitants of their district and to other persons, the exclusive right of burial in certain plots in their said burial-ground. A scale or table of fees and charges (*a*) for the performance of the burial service; (*b*) for vaults and breaking the ground for interments; (*c*) for monuments and inscriptions, was fixed and settled by the board and duly approved pursuant to the statutes in that behalf. The scale fees for the performance of the burial service have been paid to the registrar and by him handed over to the minister or other person performing the service; or, when the registrar performed the service

(1) The case set out the scale according to which these fees were paid.

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have been retained by him. Such fees were not passed through the board's books of account, and the defendants contend that such payments to the registrar did not constitute a payment to the board. The plaintiffs on the other hand contend that they did. The scale charges and fees for vaults, breaking the ground, monuments, and inscriptions, have been received by the board.

19. The board have permitted the burials mentioned in par. 17 hereof to take place without the permission of, or any notice to any of the incumbents of the parishes or districts within the district of the board, and to be performed by persons other than the said incumbents, or their curates, or other qualified persons duly authorized by them, some of such persons not being clerks in Holy Orders, in both the consecrated and unconsecrated portions of the said cemetery, and without the permission of the said incumbents, or any of them, and also without any notice being given to them, pursuant to the statute 43 & 44 Vict. c. 41, s. 1, if that section has any application to the case, and the plaintiffs have thereby been prevented from performing the burial service in such cases.

20. The plaintiffs have always been ready and willing to perform all such services, and the defendants have not since the opening of their said burial-ground made any payments to the plaintiffs, except in the cases where the latter have performed the funeral service. In those cases the defendants have made the plaintiffs the payments for the performance of such services only as are mentioned in par. 17 hereof, and except in those cases they deny the right of the plaintiffs, or any of them, to receive any fee in respect of interments in their said burial-ground, whether in respect of the performance of the burial-service, or of the grant of exclusive rights of burial, or in respect of vaults, breaking ground, monuments, or inscriptions.

21. The plaintiff, the Rev. F. J. Wood, claims to be entitled by himself or his curate, or other qualified person authorized by him, to perform the duties, and to have the same rights and authorities for the performance of religious service in the burial in the cemetery, so provided by the said board, of the remains of parishioners or inhabitants of the whole district of the said board, or alternatively those of the present chapelry district of St. Michael,

and also to be entitled to receive the same fees in respect of such burials which he or his predecessors, the incumbents of St. Michael's, previously enjoyed and received for burials in the said churchyard of St. Michael's, or for the grant of exclusive rights of burial therein, or of constructing vaults or places of burial with the exclusive right of burial therein, as if such cemetery so provided by the said board was the burial-ground of the said chapelry of St. Michael. And further, that the said consecrated portion of the said cemetery is to be deemed to be the burial-ground for the whole district or chapelry, or alternatively for his said present chapelry district, and the districts of the other plaintiffs, and that the defendants are not entitled to grant to any person not an inhabitant of such district or districts any right of burial therein without the permission of the said plaintiff, or alternatively the permission of one of the plaintiffs the other said present incumbents, and that he or they are entitled to all fees for the performance of the burial service, or acting in any way in respect of such burial. He also claims for himself, or alternatively for himself and his co-plaintiffs, to be entitled to fees for such monuments, gravestones, tablets, and inscriptions, erected or placed, or to be erected or placed in the consecrated part of the said cemetery, or in the chapel erected thereon, or alternatively for all such of them as have been or may be erected or placed over the remains, or in memory of parishioners or inhabitants of the said district of the said board in lieu of the fees or sums which he or they would have been entitled to for the erecting or placing of such monuments, &c., in the church of St. Michael or the churchyard attached thereto.

22–24. The plaintiffs, the incumbents respectively of St. Matthias Burley, St. Augustine Wrangthorn, and All Hallows, make the like claims with regard to the parishioners or inhabitants of their respective districts. The plaintiffs further jointly and severally claim that the said board do pay to them to be equally shared amongst them as such incumbents respectively, all fees received by the said board in respect of the burials within the said cemetery of the bodies of non-parishioners or non-inhabitants of the district of the said board, and also the fees received by the said board for the opening of graves, or the

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construction of vaults or monuments, &c., in respect of such burials of non-parishioners or non-inhabitants within the consecrated portion of such cemetery.

25. The defendants deny that the plaintiffs or any of them have, or has any of the rights, or are or is entitled to any of the fees claimed by them.

The questions for the Court were: Whether the plaintiffs, or any and which of them, had any, and if any which of the rights, or were or was entitled to any and which of the fees above claimed by them respectively.

Forbes, Q.C., and *Yarborough Anderson*, for the plaintiff Wood. The defendant board was created under the provisions of 15 & 16 Vict. c. 85, which, so far as is material to this case, was extended to the whole of England by 16 & 17 Vict. c. 134, s. 7. The defendants' burial-ground was provided, and the chapel thereon was built, and a portion of the ground was consecrated in accordance with ss. 10, 23, 24, 25, and 30 of 15 & 16 Vict. c. 85; and the expenses incurred have been paid out of the rates as provided by s. 19 of that Act. The claim is made by the plaintiffs in respect only of the consecrated portion of the cemetery. Sect. 32 of 15 & 16 Vict. c. 85 (1), applies directly to the case of

(1) 15 & 16 Vict. c. 85, s. 32: "From and after the consecration as aforesaid of any burial-ground provided under this Act . . . . such burial-ground shall be deemed the burial-ground of the parish for which the same is provided, and where the same is provided for two or more parishes such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish; and every incumbent or minister of the parish or of each of the parishes (as the case may be) for which such burial-ground is provided shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorize, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received . . . . as if such burial-ground were the burial-ground of the respective parish of such incumbent or minister . . . . and the parishioners and inhabitants of such parish or of each of such parishes shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial-ground or burial-grounds in and for their respective parish subject nevertheless to the provisions herein contained."

the plaintiff Wood. Therefore, except in those cases where the provisions of the Burial Laws Amendment Act, 1880 (1), as to the giving of notice, &c., to the incumbent, have been complied with, the clergy have as to such burial-grounds, as well as to the parochial churchyards, all their previous rights as regards performance of the burial service, fees, &c. Here the case states (par. 19) that the defendants have permitted burials to take place without notice to the plaintiffs.

Then as to the construction of vaults and the erection of monuments, gravestones, and inscriptions, s. 33 of 15 & 16 Vict. c. 85, enacts that there shall be payable to the incumbent or minister of the parish out of the fees or payments to be paid in respect of any such rights in the consecrated part of the burial-ground (in lieu of the fees or sums which he would have been entitled to on the grant of the like rights in the burial-ground of his parish) such fees or sums as shall be fixed or as he would by law or custom have been entitled to on the grant of the like rights in the burial-ground of his parish.

This section distinctly gives to the plaintiff Wood the right to receive the like payments as the case finds (par. 16), that he formerly received in respect of the ancient burial-ground of St. Michael's. The words "incumbent" and "minister" are defined by s. 52 of the Act. The plaintiff Wood is also entitled to double interment fees in respect of the burial of strangers, that is, persons who came from outside the chapelry district of St. Michael, for the case states that these double fees were accustomed to be paid to and received by him with regard to the ancient burial-ground of St. Michael. (2)

The defendant board have acted wrongly in permitting burials to take place in their cemetery and burial services to be performed there by unauthorized and unqualified persons without causing notice to be given to the incumbent so that he might have an opportunity of performing the burial service as he is required to do by s. 32 of 15 & 16 Vict. c. 85. It may be that in such cases the incumbent cannot recover the fees, because he has not performed the service; but par. 19 of the case states

(1) 43 & 44 Vict. c. 41.

(2) This appeared from the scale of fees set forth in par. 16 of the case.

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that the plaintiffs have been thereby prevented from performing the service, and, therefore, the plaintiffs are at any rate entitled to damages for these wrongful acts.

[COLLINS, J. Has the incumbent any right at law to such notice? If not, I do not see the plaintiffs' cause of action, for they have not been prevented in any other sense.]

Apart from the notice prescribed by 43 & 44 Vict. c. 41, s. 1, there is a duty upon the defendants to give a reasonable notice in all cases: *Ormerod* v. *Blackburn Burial Board* (1), in which case judgment was afterwards given for the plaintiff upon a special case. (2) The Court should draw the inference of fact that the plaintiffs were prevented from earning the fees in consequence of the absence of notice to them, and the appointment of unauthorized persons to perform the service.

No chaplain has been appointed by the defendants, and the plaintiffs have not appointed any under 15 & 16 Vict. c. 85, s. 39; therefore, notice to the incumbent is absolutely necessary in order that there may be a proper person upon the spot ready to perform the service.

[COLLINS, J. Does not that tell against the plaintiffs, because that section places them in a position to claim to perform the service by a chaplain, and they have not chosen to appoint one?]

The defendants have also acted wrongly in allowing unauthorized and unqualified persons to officiate at burials in the consecrated portion of the cemetery, without complying with the conditions imposed by 43 & 44 Vict. c. 41, ss. 1, 5; those conditions are notice and payment of fees, the fees in such cases being payable to the incumbent whether the service is performed by him or not. The plaintiffs must look to the defendants for payment of the fees, 15 & 16 Vict. c. 85, ss. 32, 33, 35. Moreover, 43 & 44 Vict. c. 41 gives no right to the defendants to allow the interment of strangers in the cemetery, without the permission of the plaintiffs, for s. 32 of the earlier Act makes the cemetery "the burial-ground of the parish."

As to fees for the erection of monuments, &c., s. 33 of 15 & 16 Vict. c. 85, clearly reserves to the plaintiff Wood the right to all

(1) 28 L. T. (N.S.) 438. (2) Not reported.

fees which he would have had with regard to monuments in the ancient burial-ground of St. Michael's.

[*Channell, Q.C.*, for the defendants, stated that he did not dispute that in regard to monuments, &c., fees were payable to the plaintiffs or some or one of them out of the fees received by the board in respect of parishioners or inhabitants.]

The statute 20 & 21 Vict. c. 81, s. 5, does not give to the other plaintiffs in whose districts no burial-ground was provided any right to these fees, for that section apparently only applies to fees for performing the services; therefore the plaintiff Wood is entitled to the whole of the fees for monuments, &c.

[They cited also *Day* v. *Peacock* (1); *Cronshaw* v. *Wigan Burial Board* (2); *Stewart* v. *West Derby Burial Board.* (3)]

Bargrave Deane, for the plaintiffs, the incumbents of St. Matthias Burley, St. Augustine Wrangthorn, and All Hallows. 15 & 16 Vict. c. 85, gives no power to a burial board to authorize any person to perform a burial service. The board are to provide a chapel, but not a person to officiate; and an incumbent would be liable to ecclesiastical punishment if he refused to officiate. The board having the control of the cemetery are bound to give the plaintiffs notice of burials, because they are the only persons who have a right to perform the services.

Channell, Q.C., and *Manisty*, for the defendants. The defendants admit the right and duty of the plaintiffs to perform the burial service as to their own parishioners; and in every case where either of the plaintiffs has performed such service the defendants have paid the fee therefor to that plaintiff. But the defendants deny that they are bound to give notice of burials to the plaintiffs. [They were stopped by the Court upon this point.]

As to the performance of services by unauthorized or unqualified persons. If the relative or representative has given the notice required by 43 & 44 Vict. c. 41, s. 1, the incumbent is entitled to receive from such person a fee (s. 5) by a species of constructive earning; and if the board had received that fee an action would lie against them for money had and received, but

(1) 18 C. B. (N.S.) 702; 34 L. J. (C.P.) 225.

(2) Law Rep. 8 Q. B. 217.

(3) 34 Ch. D. 314.

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the case does not state such facts. Payment to the registrar in the circumstances stated in par. 17 of the case was not payment to the board, because the board are not entitled to take fees for services, and these fees were not passed through their books. If the board have permitted unauthorized persons to officiate in instances where there has been a neglect to give a notice under 43 & 44 Vict. c. 41, s. 1, the neglect has not been on the part of the board, for it is not the duty of the board to give the notice, but of the person desirous of dispensing with the burial service. Moreover, if the incumbent fails to be present where no notice to dispense with the service has been given to him by the relative, &c., then the fee is not due at all, because the attendance of the incumbent has not been excused.

As to the fees for monuments, &c., the fees to the incumbents are only to be paid out of the fees which the board receive, 15 & 16 Vict. c. 85, s. 33. Therefore, if the board's fees are less than those which were formerly payable to the incumbent he is not to get anything.

As to fees for the interment of strangers. There is nothing in any of the Burial Acts to give to an incumbent a right to fees in respect of such interments. The freehold of the cemetery is not in the incumbent, as in the case of a churchyard. The only rights given to the incumbent relate to parishioners, and he has no right to provide burial for strangers in a cemetery created at the cost of the ratepayers. Even with regard to a churchyard an incumbent has no right to alienate a part of the ground for a stranger's burial, although no doubt it has been the practice to do so. The cemetery is the burial-ground of the parish; but it is also something more, it is the burial-ground for the whole of the defendants' district, and as to persons who were not parishioners of the particular parish or ecclesiastical district the board have no duty to the incumbent of that parish or district.

Forbes, Q.C., in reply. The board have permitted illegal acts in permitting unqualified or unauthorized persons to officiate; Cripps on the Clergy (6th ed.), p. 656, citing *Johnson* v. *Friend & Ballard* (1). It is to be inferred from pars. 19 and 25 of

(1) 6 Jur. (N.S.) 280.

the case, that the board knew that no notice had been given to the incumbent.

LORD COLERIDGE, C.J. This is a case in which several clergymen—all of whom, with the exception of the plaintiff, Wood, are upon the same footing, and his position differs, perhaps, very little from theirs—have brought an action against the Headingley Burial Board. That action has by consent been turned into a special case, by which the plaintiffs ask for a declaration of their rights in regard to the performance of religious services on all burials in the consecrated portion of Lawnswood Cemetery, which is the burial-ground of the defendants, and in regard to the fees in respect of such services; and in respect of grants of exclusive rights of burial; and of monuments, inscriptions, and so forth. As to the monuments and inscriptions, the claims of the plaintiffs are really not disputed.

The district of the burial board is divided into a parochial chapelry and certain ecclesiastical districts, which have been carved out of such chapelry. Lawnswood Cemetery has been provided by the burial board for each and all of these. The cemetery consists of a consecrated and an unconsecrated portion. The questions in this case arise as to the consecrated portion only; as to the unconsecrated portion, the plaintiffs do not deny that the board may do pretty much as they like, provided that everything is done decently. It is material that I should state what I consider is meant by consecration. No doubt a practice has grown up of accompanying the ceremony of consecration with certain suitable and seemly prayers; but that is not the consecration itself. Consecration is effected by the decree of a competent ecclesiastical Court—that is to say, the act or sentence of consecration, signed by the bishop, setting aside the ground or building in sacros usus. That is what constitutes the legal act of consecration. The difference between consecrated and unconsecrated ground is, that the former has been set aside for all time, or until the decree has been set aside by a like authority, to sacred purposes. While the decree or sentence remains, the ground or building in question is set apart solely for those sacred purposes. Here, therefore, we are merely concerned to

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see whether what has been done is within those purposes. It is only in so far as the sacred rights of the clergy are interfered with that a clergyman has any right to complain.

Now, it is material to see what the legislature has said as to this consecrated portion of a cemetery. The matter turns upon the words of the statute 15 & 16 Vict. c. 85, which was originally limited to the metropolis, but which has been made a general enactment by 16 & 17 Vict. c. 134. A few of the sections of the earlier Act are material for our consideration. The burial board are to acquire land for a burial-ground, and by s. 30 they are empowered to lay out and embellish the ground, and to build a chapel for the performance of the burial service according to the rites of the Church of England. The same section enacts that the burial-ground may be consecrated by the bishop, provided that in all burial-grounds there is to be a portion which shall not be so consecrated as aforesaid, and the board may build thereon a suitable chapel or chapels for the performance of funeral service. I pass away from the unconsecrated portion, because we are not concerned with that in this case. Sect. 31 is not material. Sect. 32 is the material section, and is that upon which the arguments before us have been based. It enacts that where the burial-ground "is provided for two or more parishes, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish." That is material, because it shews that the consecrated portion is not parcelled out between the different parishes, but each parish holds, as it were, per mie et per tout. Then the section goes on: "And every incumbent or minister of the parish or of each of the parishes (as the case may be) for which such burial-ground is provided shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorize, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received." Where, therefore, there are, say, six

parishes comprised in the burial board district, that section undoubtedly gives the six incumbents such rights in respect of the burial therein of a person over whose burial in a churchyard they would have had rights, as they would have had had the burial been in the churchyard. But the rights of the incumbents are limited to sacred rights. The "freehold" (I use this word in a very limited sense, and as importing only the very anomalous right of an incumbent in the soil of a churchyard) of the incumbent is gone, and he has the same rights quoad sacra only in the burial-ground as he had in the churchyard; his rights of property are taken away. The incumbent is required by this section to perform the duty of officiating at the burial service, and upon performance of that duty he is to receive the same fees as he formerly would have received. Now, in this case, the burial board have not given notice to the several incumbents of the burials which were about to take place of the bodies of persons who belonged to the respective parishes. In consequence the bodies have been buried without the attendance of the incumbents, and the board have taken the fees, and handed them over to the persons who performed the service. It is said on the part of the plaintiffs that an action therefore lies for damages, because the plaintiffs have been prevented by the board from doing their duty. I am of opinion that such an action will not lie. The board have not prevented the plaintiffs from officiating; for, whenever an incumbent has been present, he has performed the service, and the fee has been paid to him. It is only in those cases where the incumbent has not come to the funeral that the fee has been diverted. But the payment of the fee to a person other than the incumbent is not actionable, unless it can be inferred that it was the duty of the board to give notice to the incumbent that a corpse was being brought for burial. There is no such provision made in the Burial Acts. The rights of the clergy in these matters have been very materially altered by those Acts; and I think that clergymen must now be taken to have the rights reserved to them by those Acts, and such rights only. Therefore, the Acts being silent as to any right to receive such notice, I do not think that there is such a right. In my opinion, accordingly, the plaintiffs have not shewn any

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obstruction to their rights by the board; and, so far as the plaintiffs' claims rest upon that general contention, they have failed in proving it. It is their duty to earn the fees by performing the service; and where they have not done that, their claim must fail. That disposes of a large portion of the case.

Then as to the burial of persons as to whom a claim for burial in consecrated ground without the rites of the Church of England had been made. That is a claim which can be made by virtue of the Burial Act of 1880 (1) (commonly called Osborne Morgan's Act), under which, upon due notice being given to the incumbent, the relatives, friends, or representatives of the deceased person may claim to have such service as they may prefer in lieu of the burial service of the Church of England, or they may elect that the burial shall take place without any religious service, provided in either case that decency and public order are observed and that the service used (if any) is a Christian service.

The case states that persons have been buried in this manner without notice to the incumbent, and it is argued that the board have therefore not brought themselves within the protection of that Act. That raises the question: Whose duty is it to give this notice to the incumbent? It is clearly the duty of those upon whom the Act confers the privilege, viz., the relatives, friends, or representatives of the deceased. It is not the duty of the board, for they might not know to which clergyman the notice should be sent. As the plaintiffs have failed to get the fees which they constructively earn under s. 5 of Osborne Morgan's Act, their remedy, if any, must therefore be against the persons upon whom the duty of giving the notice is cast, and not against the board.

Then as to the claims of the plaintiffs in respect of fees for grants of exclusive rights of burial and grants of rights of burial to strangers. No doubt there has grown up a practice throughout the country for clergymen to grant leave for the interment in parochial churchyards of persons who were not parishioners, or who did not die in the parish, and who had therefore no right of interment in the particular parish. It has been usual in such

(1) 43 & 44 Vict. c. 41.

cases to arrange for the payment of special fees to the incumbent. So also, in some cases, perpetual rights of interment in particular portions of the churchyard have been granted by incumbents. These practices might be carried to such an extent as to be prejudicial to the rights of the parishioners in the churchyard, and therefore to be inconsistent with the nature of the incumbent's peculiar tenure of the soil. For the incumbent has only such rights as are consistent and co-equal with the rights of the parishioners. But whatever may be the rights of the clergy in respect of these practices, in my opinion such rights have not been preserved under the Burial Acts, where the churchyards have been closed. The clergy have therefore lost those exceptional rights, and as to such claims the action will not lie.

But the case also states that certain things have been done as to which the plaintiffs seek a declaration that the law has been broken by the board. It appears that without the notice required by Osborne Morgan's Act interments have taken place in the consecrated portion of the cemetery at which religious services have been performed, sometimes by persons who were not authorised by the incumbent and sometimes by persons unqualified as not being in Holy Orders. In these instances the board have, in my opinion, committed a breach of ecclesiastical law. No one can lawfully read a service over a corpse in a churchyard, and for this purpose the consecrated portion of a cemetery is the same thing as a churchyard, unless he is the incumbent or some clergyman duly authorized by him. The incumbents are in each diocese the representatives of the bishop, who has been called the universal incumbent. No clergyman can lawfully take upon himself to intrude into a parish, for he cannot minister canonically without a licence from the bishop of the diocese to minister in the particular parish. And, speaking generally, no clergyman can perform sacred rites in the parish of another clergyman without the consent of the incumbent; to do so would be an ecclesiastical offence. As was said by Dr. Lushington in *Johnson* v. *Friend and Ballard* (1): "By the ecclesiastical law no person, unless he be duly authorized, can be permitted to perform service on consecrated ground. It appears to me to be impossible to

(1) 6 Jur. (N.S.) 280.

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overlook such an offence." Therefore, so far as religious services have been allowed so to be performed in this cemetery by persons not authorized, that has been done which was ecclesiastically illegal, and if the burial board knew of it they ought not to have permitted it, they should have prevented it. If that is so as to unauthorized persons it is so à fortiori with regard to unqualified persons. The board has permitted it in both instances, and with regard to such cases therefore the law has been broken. Under the circumstances of the case, however, we are not disposed to grant an injunction against these acts, for we do not suppose they will be repeated; it is sufficient to declare the law upon the subject.

We are further asked to determine the rights of the plaintiffs inter se. As to this I should say that their rights ought to be regulated by the right of interment in each case in regard to the particular incumbent. Thus, if there be a right of interment as a parishioner of St. Michael's, the fees will be due to the incumbent of St. Michael's; and so, reddendo singula singulis, each incumbent being entitled under s. 32 of 15 & 16 Vict. c. 85, to the rights he would be entitled to in his own parish. As the board are accustomed to receive the fees in the first instance the board should pay them over when received to the particular incumbent who is entitled.

COLLINS, J. I am of the same opinion, and for the same reasons.

Judgment accordingly.

Solicitors for plaintiffs: *Patersons, Snow, Bloxam & Kinder, for Dibb & Co., Leeds.*

Solicitors for defendants: *Maudes & Tunnicliffe, for Butler & Middlebrook, Leeds.*

W. J. B.

THE GUARDIANS OF THE BATH UNION *v.* THE GUARDIANS OF THE BERWICK-UPON-TWEED UNION.

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Feb. 5.

Poor-law—Settlement—Derivative Settlement—Child under Sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

The father of children who were born after the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 35, came into operation, but who was himself born before that date, had acquired no settlement for himself since he attained the age of sixteen years, and his father's settlement was a derivative one. The children having become chargeable to the parish while under sixteen and during their father's lifetime:

Held, that the children took the settlement of their father, and that since it could not be shewn what settlement he derived from his father without inquiring into the derivative settlement of his father, the children must be taken to be settled in the parish in which their father was born.

SPECIAL CASE stated by the Recorder of Berwick-upon-Tweed, under 12 & 13 Vict. c. 45, s. 11, upon an appeal by the guardians of the poor of the Bath Union, against an order of justices adjudging the last legal settlement of Maud Randall, William Randall, and Ada Randall to be in the parish of St. Michael, in the Bath Union.

It appeared that the said Maud, William, and Ada Randall were all under the age of sixteen years, and were the lawful children of William Leopold Randall and Elizabeth, his wife, who had deserted him and them. The three children had become chargeable to the Berwick-upon-Tweed Union, their father being unable to maintain them, and they had not acquired a status of irremoveability. William Leopold Randall was the lawful son of Charles Randall, and was born in the parish of St. Philip and Jacob Without, in the city and county of Bristol, in the Barton Regis Union, on September 11, 1856, and he had not, since he attained the age of sixteen years, done any act to acquire a settlement for himself. Charles Randall was the son of Ebenezer Randall, and was baptized in the parish of St. Michael, in the appellant union, on March 30, 1834, his parents being at that date resident within the appellant union. It was also proved that Ebenezer Randall, whilst Charles Randall was still unemancipated, had acquired a renting and rating settlement in

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the appellant Union, and that Charles Randall had never done any act to acquire a settlement for himself.

Upon these facts the appellants contended that William Leopold Randall, being unable to maintain his children, must be regarded as the real pauper, and that the inquiry must be as to his settlement, and that if that were so, William Leopold Randall came within the third clause of 39 & 40 Vict. c. 61, s. 35 (1), and that since it could not be shewn what settlement he derived from his father, Charles Randall, without inquiring into the settlement which Charles Randall derived from his father, Ebenezer Randall, William Leopold Randall must be deemed to be settled in the parish in which he was born.

On the other hand, the respondents, the guardians of the poor of the Berwick-on-Tweed Union, contended that the inquiry must be into the settlement of the three children who were the actual paupers, and that since the provisions of the third clause of s. 35 of 39 & 40 Vict. c. 61, had no application to children under sixteen years of age, the true settlement of the children was the settlement which their father, William Leopold Randall, derived through Charles Randall from Ebenezer Randall, and that the children must, therefore, be deemed to be settled in the appellant union.

The Recorder decided in favour of the contention of the respondents.

R. Cunningham Glen, and *F. D. Blake*, (*Poland, Q.C.*, with

(1) By the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

them), for the appellants. The decision of the Recorder was wrong. The children, being under sixteen, take their father's settlement, and it is therefore necessary to inquire into it in order to ascertain their settlement. He has acquired no settlement for himself, and it is impossible to shew what settlement he derived from his father, Charles Randall, without inquiry into Charles Randall's derivative settlement. William Leopold Randall, therefore, falls within the third clause of s. 35 of the Divided Parishes Act, and is to be deemed to be settled in the parish in which he was born. It was decided by the House of Lords that the third clause of s. 35 had no application to children under the age of sixteen: *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1), and therefore William Leopold Randall, the father, is included in the words "any child."

[They referred to *Guardians of West Derby Union* v. *Guardians of Atcham Union* (2); *Guardians of West Ham Union* v. *Overseers of St. Giles-in-the-Fields* (3); *Guardians of Dorchester Union* v. *Guardians of Poplar Union* (4); *Guardians of Westbury-on-Severn Union* v. *Overseers of Barrow-in-Furness.* (5)]

Tindal Atkinson, Q.C., and *H. F. Boyd*, for the respondents. The Recorder was right. The words "any child in this section mentioned," in the third clause of s. 35 of 39 & 40 Vict. c. 61, refer to a child who is a pauper and whose settlement is in question, and not to the parent of such a child.

The third clause, therefore, does not prevent an inquiry into the derivative settlement of these children since they are under sixteen, and, as has been held in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1), the third clause has no application to children under sixteen. They therefore take their father's settlement, and are consequently settled in Bath.

[They referred to *Guardians of Hollingbourn Union* v. *Guardians of West Ham Union.* (6)]

WRIGHT, J. The question in this case is, What is the settlement of certain children under sixteen years of age, and therefore

(1) 14 App. Cas. 465.
(2) 24 Q. B. D. 117.
(3) 25 Q. B. D. 272.
(4) 21 Q. B. D. 88.
(5) 3 Ex. D. 88.
(6) 6 Q. B. D. 580.

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born since the commencement of the Divided Parishes Act, 1876, but whose father is living and was born before that date?

The first paragraph of s. 35 of that Act unquestionably applies to the children, and therefore their settlement is, at present, that of their father. The question in the case, therefore, becomes the question, What is the settlement of the father?

Sect. 35, as explained in the case of *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1), appears to be a code of transmitted status in relation to settlement, and to mean, so far as material, that every person as to whom any question of settlement arises (whether in relation to a question of his own removal, or in relation to a question of the settlement or removal of any children who derive settlement from him), is, after he has passed the age of sixteen, to be deemed to be settled in the place of his birth, unless a primary settlement can be found for his own parent.

In the present case the father of the children is over sixteen, and no primary settlement can be found for his own parent; and, therefore, if the above view is correct, the settlement of their father, and consequently that of the children, is the place of their father's birth—that is, in the Barton Regis Union, and not in either of the litigant unions.

The doubt that we have felt was, how far s. 35 is retrospective. To give it a fully retrospective effect might be to disturb settlements which have been acted on. But in *Guardians of Westbury-on-Severn Union* v. *Overseers of Barrow-in-Furness* (2), it was treated as retrospective; and even apart from that authority, it may well be that, for the purpose of determining the settlement of children born after 1876, their father's settlement is governed by s. 35, even though his settlement, for the purposes of his own removal, might not be affected by s. 35. All possibility of hardship or confusion appears to be prevented by s. 36; and, even without it, might be avoided by holding the enactment to be retrospective for all purposes, except only as regards adjudications made before the commencement of the Act, follow-

(1) 14 App. Cas. 465. (2) 3 Ex. D. 88.

ing the distinction noted by Willes, J., in *Phillips* v. *Eyre* (1), between retrospective and ex post facto litigation.

The appeal, therefore, succeeds.

LAWRANCE, J., concurred.

Appeal allowed.

Solicitors for appellants: *Pilgrim & Phillips, for Williams, Bath.*

Solicitors for respondents: *E. Bromley, for Willoby & Peters, Berwick-upon-Tweed.*

A. P. P. K.

CHALMERS *v.* SCOPENICH.

1892

March 22.

Ship—Merchant Shipping Acts—Overloading—Foreign Ship—Order in Council—Merchant Shipping Act, 1876 (39 & 40 *Vict. c.* 80), *ss.* 13, 34, 37.

The provisions contained in s. 34 of the Merchant Shipping Act, 1876, as to the detention of ships which are unsafe by reason of overloading, apply to the ships of a foreign state taking in cargo at a port in the United Kingdom, although there has not been any Order in Council under s. 37, specifically applying such provisions to the ships of such state.

CASE stated by the stipendiary magistrate for Cardiff under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49. The defendant was master of the Austrian steamship *San Giusto*, and was summoned by the Board of Trade, under s. 34 of the Merchant Shipping Act, 1876, "for that being master of a foreign ship which had taken on board her cargo at a port in the United Kingdom, namely, at Penarth, in the port of Cardiff, he, at Penarth aforesaid, on October 23, 1891, after service upon him of notice of the detention of his vessel by the Board of Trade for being unsafe by reason of overloading, did proceed to sea before his said vessel was released by competent authority."

The summons came on for hearing on February 12, 1892, and the solicitor for the Board of Trade stated that he should prove that the *San Giusto* was an Austrian vessel classed at Lloyd's, and that in October, 1891, a cargo of coal was shipped on board of

(1) Law Rep. 6 Q. B. 1.

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her at Cardiff, and that on October 23 she was observed by the surveyor of the Board of Trade to be then unsafe by reason of overloading, and that a duly empowered officer of the Board of Trade thereupon made a detention order under the Act, and that a notice of such order was served upon the defendant and on the Austrian consul at Cardiff, but that the defendant declined to comply with the order and sailed away to sea. Before any evidence was called, the solicitor for the defendant submitted that it was necessary as part of the case for the prosecution that they should prove an Order in Council under s. 37 of the Merchant Shipping Act, 1876, making the provisions of ss. 13 and 34 applicable to Austrian vessels (1), and contended that the provisions of the Merchant Shipping Act, 1876, as to overloading did not apply to foreign ships unless they were specially made applicable by an Order in Council. It was admitted that there was no Order in Council making the provisions of the Merchant Shipping Act, 1876, as to overloading applicable to Austrian vessels, and the magistrate thereupon dismissed the summons.

(1) By the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), s. 13, "Where a foreign ship has taken on board all or any part of her cargo at a port in the United Kingdom, and is, whilst at that port unsafe by reason of overloading or improper loading, the provisions of this Act with respect to the detention of ships shall apply to that foreign ship as if she were a British ship."

By s. 34, "Where under the Merchant Shipping Acts, 1854 to 1876, or any of them, a ship is authorized or ordered to be detained, any . . . officer of the Board of Trade . . . may detain the ship, and if the ship . . . after service on the master of any notice of or order for such detention, proceeds to sea before it is released by competent authority, the master of the ship . . . shall forfeit and pay to Her Majesty a penalty not exceeding 100*l*."

By s. 37, "Whenever it has been made to appear to Her Majesty that the government of any foreign state is desirous that any of the provisions of the Merchant Shipping Acts, 1854 to 1876, or of any Act hereafter to be passed amending the same, shall apply to the ships of such state, Her Majesty may by Order in Council declare that such of the said provisions as are in such Order specified shall (subject to the limitations, if any, contained in the Order) apply, and thereupon so long as the Order remains in force such provisions shall apply (subject to the said limitations) to the ships of such state, and to the owners, masters, seamen, and apprentices of such ships when not locally within the jurisdiction of such state, in the same manner in all respects as if such ships were British ships."

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Sir R. E. Webster, *A.G.*, and *H. Sutton*, for the Board of Trade. The magistrate was wrong. The provisions of s. 34 are expressly made applicable to foreign ships by s. 13. Sect. 37 has no application to the provisions as to overloading or improper loading. It is only a re-enactment of s. 11 of 36 & 37 Vict. c. 85, and at the time that statute was passed the provisions as to overloading had not been made applicable to foreign ships. Now, by s. 4 of the Merchant Shipping Act, 1890 (53 & 54 Vict. c. 9), it is enacted that if the Board of Trade can certify that sufficient provisions as to overloading or improper loading obtain in any foreign country, the enactments of the Act of 1876 as to detention for overloading or improper loading shall not apply to the ships of that country.

[They referred to *The Parlement Belge*. (1)]

F. W. Raikes, (*Barnes*, *Q.C.*, with him), for the defendant. The magistrate was right. There is power under s. 13 to detain a foreign ship; but there is no power to put into force the provisions of s. 34 against her master without an Order in Council under s. 37. The provisions of s. 34 cannot be applied to foreigners unless the foreign nation has consented to its application.

DENMAN, J. In this case I think that the magistrate has put a construction on the Act of Parliament which it was not intended to bear. Proceedings were taken against the master of an Austrian ship, which had been detained in the port of Cardiff, under the provisions of ss. 13 and 34 of the Merchant Shipping Act, 1876. The magistrate thought that he had no jurisdiction to enforce the powers given by s. 34 against the master of an Austrian ship, because there was no Order in Council making the provisions of the Act as to overloading applicable to Austrian ships. The Act was passed to deal with unseaworthy ships. It is unnecessary now to decide whether any of the provisions of the Act contained in the sections preceding s. 13 are applicable to foreign as well as to British ships. Sect. 13, however, refers in express terms to foreign ships which are "unsafe whilst at a port in the United Kingdom" by reason of

(1) 5 P. D. 197.

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overloading or improper loading. That means, I think, unsafe for going to sea—unsafe whilst at the port in contemplation of a voyage. If the ship is unsafe in that sense, then the provisions of the Act are to apply just as if it were a British ship. We have to assume for the purposes of this case that this ship was unsafe in that sense by reason of overloading or of improper loading, and that she had taken in part of her cargo at a port in the United Kingdom. Then we come to s. 34, which says that "when under the Merchant Shipping Acts, 1854 to 1876, or any of them, a ship is authorized or ordered to be detained," and proceeds to sea without being released by competent authority, the master of the ship shall be liable to a penalty. It is said that this section does not apply to foreign ships, and that it would work hardship to hold that it did so apply. I cannot see why. It seems to me that there is nothing outrageous in the supposition that this country should have legislated for the benefit of those foreigners who enjoy its hospitality. The Act was passed for the benefit of seamen, and in my opinion "a ship" in the section means any ship, whether British or foreign. The magistrate has, however, held that s. 34 was not applicable, because by s. 37, if the government of any foreign state is desirous that any of the provisions of the Merchant Shipping Acts, 1854 to 1876, should apply to the ships of such state, Her Majesty may by Order in Council make any of the provisions of such Act or Acts, which are specified in the Order, to apply to the ships of that state; and the contention is, that since there is no Order in Council making the provisions of this Act as to overloading applicable to Austrian vessels, such provisions do not apply to the ship in question. That is, I think, too sweeping a view to take of the section. There are many other provisions of the Merchant Shipping Acts from 1854 to 1876 which can only be made applicable to foreign ships by means of such an Order in Council. The Act of 1876, for instance, contains provisions as to the marking of the load-line, as to signals of distress, and as to the space to be provided for passengers, and s. 37 may well be construed as referring to such provisions as these, and not to the matters dealt with by ss. 13 and 34. It is unnecessary to go more in detail into the

question. The intention of the Act was to provide a safeguard for seamen sailing from British ports; and I think the magistrate was wrong in the view he took of s. 37. The case must, therefore, go back to him with this expression of our opinion.

A. L. SMITH, J. I have arrived at the same conclusion. I think that the provisions of s. 34 can be put in force against the master of a foreign ship, if it is overloaded so as to be unsafe to go to sea, without any necessity for an Order in Council under s. 37. The intention of the Act is fairly clear: it deals with ships which are in any respect unseaworthy. Sect. 13, in express terms, provides for the detention of a foreign ship which is unsafe at any port in the United Kingdom by reason of overloading there. The provisions of the Act as to detention are made applicable to her just as if she were a British ship, with some modifications which are immaterial in the present case. Sect. 37 has, in my opinion, no application to such a case. It only applies where a foreign state is anxious to get the benefit of those provisions of the Merchant Shipping Acts, 1854 to 1876, which are not expressly made applicable by statute to foreign vessels. There are many such provisions in the Acts; but this provision as to overloading is, by s. 13, expressly made applicable to foreign vessels, and, therefore, no Order in Council is necessary in order to apply it. As has been pointed out, s. 37 is only a re-enactment of s. 11 of 36 & 37 Vict. c. 85, which was passed before the provisions as to overloading were expressly made applicable to foreign ships by statute. I am doubtful how far we are justified in interpreting the intention of the legislature by reference to subsequent statutes, but certainly the view that I have expressed is strongly confirmed by s. 4 of the Merchant Shipping Act, 1890. I, therefore, think that the magistrate was wrong in holding that s. 34 did not apply to this case.

Case remitted to the magistrate.

Solicitors: *Solicitor to the Board of Trade; Turnbull, Tilly & Mousir, for Ingledew & Rees, Cardiff.*

A. P. P. K.

C. A.
1892
Jan. 21;
March 2.

[IN THE COURT OF APPEAL.]

COOPER *v.* GRIFFIN.

*Practice—Charging Order—Debtor's Shares "standing in his name, in his own right"—Qualification of Director—*1 *&* 2 *Vict. c.* 110, *s.* 14.

By 1 & 2 Vict. c. 110, s. 14, the shares of a debtor, against whom judgment has been recovered, "standing in his name, in his own right," may be charged with payment of the judgment debt. The articles of association of a company provided that the qualification of a director should be the "holding in his own right" 300 shares; and certain shareholders of the company, in order to qualify a person as managing director, and with the knowledge and assent of the directors, transferred the requisite number of shares into his name on the register of the company, the transferors themselves retaining the beneficial ownership of the shares. Judgment having been recovered against the transferee by the plaintiff:—

Held (affirming the decision of the Queen's Bench Division), that the shares were not held by the judgment debtor "in his own right," so as to entitle the plaintiff to a charging order upon them under 1 & 2 Vict. c. 110, s. 14.

Pulbrook v. *Richmond Consolidated Mining Co.* (9 Ch. D. 610) discussed.

Appeal from a decision of the Queen's Bench Division.

On August 25, 1891, the plaintiff recovered judgment against the defendant for a sum of 780*l.*, and costs to be taxed. On August 29, 1891, he obtained, ex parte, an order nisi from a master charging 300 fully paid-up £1 shares in the North-Eastern Bulfontein Mining Company, Limited, standing in the defendant's name in the register of the company, with payment of the judgment debt. On the matter coming before Charles, J., C. J. Posno, Baron Erlanger, and L. Floersheim appeared by counsel to shew cause against the order nisi being made absolute. It appeared from the affidavits used on their behalf before the learned judge at chambers, and from a supplementary affidavit of C. J. Posno used in the Divisional Court and Court of Appeal, that the defendant had no beneficial interest whatever in the shares, which were, as to 100 of them, the absolute property of C. J. Posno; as to another 100 of them, the absolute property of Baron Erlanger; and as to the remaining 100 shares, the absolute property of L. Floersheim. It also appeared that the shares were transferred into the name of the defendant by Posno, Erlanger, and Floersheim respectively, in order to give him a

qualification as managing director of the company; and that, concurrently with the execution by the defendant of the transfers to him, he executed blank transfers of the shares to Posno, Erlanger, and Floersheim respectively, in whose hands the certificates of the shares always remained. The transaction was discussed at a meeting of the board of directors of the company, and they agreed to the transfer of the shares to the defendant, whom they had appointed manager of the company, in order to enable him to be styled "managing director." The company was registered as a limited company in March, 1889, and art. 67 of the articles of association provided that the qualification of a director should be "the holding in his own right of 300 shares, in respect of which all calls for the time being due shall have been paid." Posno was himself a director, and Erlanger and Floersheim were shareholders, when the transfer to the defendant was made. The debt in respect of which the plaintiff recovered judgment against the defendant accrued due nearly six years before the transfer of the shares into the defendant's name.

Charles, J., made absolute the order nisi, and Posno, Erlanger, and Floersheim appealed from the learned judge's order to the Queen's Bench Division.

Channell, Q.C. (*Wedderburn*, with him), for the appellants. The learned judge ought not to have made the order nisi absolute. By 1 & 2 Vict. c. 110, s. 14, a judgment debtor's share "standing in his name, in his own right, or in the name of any other person in trust for him," can be charged with payment of the amount recovered under the judgment. The object is to charge the property of the debtor only. The words "or in the name of any other person in trust for him," shew that. There is nothing to prevent the debtor or third parties shewing that the shares which stand in the debtor's name are not really held in his own right, but belong to other persons for whom he is a trustee. There is no illegality in Griffin setting up, as between himself and his cestuis que trust, that the shares really belong to them; nor is there any illegality in the transaction by which the shares were placed in Griffin's name to qualify him as managing director of the company. The affidavits shew that the

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transaction was carried out with the knowledge and consent of the company. Assuming that the transaction was against the articles of association, and that the transfer of the shares would not have given Griffin a qualification as director, there is still nothing illegal in it, so as to give the judgment creditor a right to complain. His right is governed by the statute, and on the true construction of it a charging order cannot be made if the person whose name appears on the register as owner is not in fact the true owner of the shares. The observations of Jessel, M.R., in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1), as to the meaning of the words "in his own right," occurring in the articles of association of a company, were dissented from by Cotton, L.J., in *Bainbridge* v. *Smith.* (2) He said that the meaning of a shareholder holding shares "in his own right" was that he must not only have the legal right to deal with them, but must have the beneficial ownership of them, although he might have given an equitable mortgage of the shares. There is no estoppel in this case, because nothing has been done to alter the creditor's position: *Re The Blakely Ordnance Co.* (3) is directly in point in favour of the appellants. The decision of the judge at chambers was based upon *Cragg* v. *Taylor* (4); but that case has no application here. It was a decision given before the passing of the Judicature Acts, and the judgments of all the members of the Court shew that it went upon the ground that the Courts of common law had no jurisdiction to administer equitable rights. [He also referred to *Gill* v. *Continental Gas Co.* (5); *Widgery* v. *Tepper.* (6)]

C. Lyttleton Chubb, for the judgment creditor. The decision of the learned judge at chambers was right. The order only charges such interest as the debtor has in the shares. The order, as it stands, is good, and the question whether the three cestuis que trust have any right to interfere must be settled hereafter, according to the decision in *Cragg* v. *Taylor* (4), which is directly in point. *Gill* v. *Continental Gas Co.* (5) confirms the view that the cestuis que trust will not necessarily be prejudiced by the

(1) 9 Ch. D. 610, at p. 614.
(2) 41 Ch. D. 462.
(3) 25 W. R. 111.
(4) Law Rep. 1 Ex. 148.
(5) Law Rep. 7 Ex. 332.
(6) 6 Ch. D. 364.

order. They are estopped from setting up that the shares do not in fact belong to the person in whose name they stand on the register. In *Re The Blakely Ordnance Co.* (1) the decision was that of a single judge only, and the facts of that case distinguish it from this. The construction put by Jessel, M.R., in *Pulbrook* v. *Richmond Consolidated Mining Co.* (2) upon the words "in his own right"—namely, that they did not mean beneficial ownership—should be applied to the same words in 1 & 2 Vict. c. 110, s. 14.

Channell, Q.C., was not called on to reply.

LORD COLERIDGE, C.J. I think that this appeal should succeed. It is an application to reverse an order made by Charles, J., who made absolute an order nisi, obtained ex parte, charging certain shares which stood in the books of the company in the name of Griffin. The charging order was made under the statute 1 & 2 Vict. c. 110, s. 14, which provides that if any person against whom any judgment shall have been entered up in the Superior Courts shall have any shares in any public company in England "standing in his name, in his own right, or"—and these words are important—"in the name of any person in trust for him," an order charging those shares may be made upon the application of the judgment creditor. But for certain expressions used in some of the cases which have been decided, I confess I should have thought it as clear as possible that, taking into consideration the whole language of the section, there must not only be registered ownership, but beneficial ownership of the shares by the debtor, in order to enable a charging order to be made against him. I say so because, as was pointed out in argument, effect must be given to the words "in his own right, or in the name of any person in trust for him," which provide in effect that where the shares stand in the name of any person other than the debtor, but that other person is a trustee of them for the debtor, a charging order may be made in respect of them. The intention of the legislature is, I think, clearly shewn to charge that only which is the debtor's real and true property, and not to charge shares which, though they may

(1) 25 W. R. 111. (2) 9 Ch. D. 610.

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stand in the name of the debtor, are not his real and true property. But a great judge—the late Sir George Jessel—in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1), delivered a judgment in the course of which he discussed the meaning of the words "in his own right," occurring in one of the clauses of the articles of association of a company. The clause was, "No person shall be eligible as a director unless he holds as registered member in his own right capital of the company of the nominal value of 500*l.* at least," and the learned judge said that registered ownership was sufficient under that clause to confer the qualification, and that the words of the clause were satisfied by a person being the registered owner without having the beneficial ownership. He founds his judgment upon the words "as registered member," and says that the company cannot look behind the register as to the beneficial interest, but must take the register as conclusive. Now the words we have to construe are different. The words "registered owner," or "registered member," do not occur in s. 14. Even if the case of *Pulbrook* v. *Richmond Consolidated Mining Co.* (1) was directly in point, I should have a difficulty in deciding according to Sir George Jessel's view, having regard to what has been said about it subsequently. But that case is not in point, because the judgment was upon words which are not to be found in s. 14. There is, therefore, an important and substantial distinction between the two cases. The decision in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1), appears to have given rise to a practice which there would be great difficulty in over-ruling in cases where the words are the same, but it is a very different matter where the governing words are not that a person shall hold "as registered member in his own right," but shall have "standing in his own name in his own right, or in the name of any person in trust for him." Now the judgment of Sir George Jessel does not stand simply without anything to qualify it. In *Bainbridge* v. *Smith* (2), a strong and clear dissent has been expressed in unmistakeable terms by Cotton, L.J., from the dictum of Sir George Jessel with respect to the words "in his own right." The Lord Justice says that, in his opinion, although the judg-

(1) 9 Ch. D. 610. (2) 41 Ch. D. 462.

ment was right, the dictum was not well founded, and that the meaning of a shareholder holding shares "in his own right," is that he must not only have the legal right to deal with them, but must have the beneficial ownership of them, although he may still be the beneficial owner if he has mortgaged the shares. There is another authority which shews that, under the statute, the right to a charging order does not depend upon the mere technical right of the debtor to shares standing in his name. In *Re The Blakely Ordnance Co.* (1), a transfer of shares was made from father to son to qualify the son as director of the company. The shares stood in the name of the son until they were re-transferred to the father, who had always received the dividends upon them and was the real owner of them. Malins, V.C., held that a charging order could not be made upon the shares in respect of the son's debt, because the shares were held not in his own right, but as trustee for the father, though they stood in the son's name. We were pressed with the case of *Cragg* v. *Taylor* (2), decided in 1866. I do not doubt that the decision was a proper one at the time it was given; but it was given before the Judicature Acts came into operation, and turned upon the distinction which then existed between Courts of Law and Equity. The ground of the decision was that, whatever might be the equitable rights of the debtor, those rights could not be set up or enforced in a Court of Law. *Cragg* v. *Taylor* (2), is therefore, since the passing of the Judicature Acts, not an authority which binds us. It may be that for certain purposes, and as between certain parties, the debtor in the present case is the holder of the shares which stand in his name. It may be that as between the company and the debtor, the company consenting to the transaction and allowing the shares to be transferred for the purpose of giving a qualification, he is the real shareholder. Probably, that may be so, if the company were not aware of the real nature of the transaction. It is so "a fortiori" if they were aware. Perhaps something might be said in support of the creditor's right to a charging order if it could be shewn that the creditor had been injured by the transaction, or that his position had been altered to his disadvantage, but

(1) 25 W. R. 111. (2) Law Rep. 1 Ex. 148.

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nothing of that kind is even suggested in this case. The facts appearing in the affidavits establish, to my mind, that the shares in question are shares standing in the name of Griffin, the debtor, but not in his own right; and further, that they are really shares standing in his name in trust for three other persons. The only question is whether the facts stated in the affidavits bring the case within the statute, and I am of opinion that the condition precedent required by the statute before a charging order can be made, namely, that the shares sought to be charged are held by the debtor "in his own right" is not fulfilled; that there is no principle or authority which compels us to find that the shares are held in the debtor's own right within the meaning of the enactment, and therefore that a charging order ought not to have been made.

COLLINS, J. I am of the same opinion. It is a settled principle that a creditor cannot recover from his debtor more than the debtor really has, and the Act of Parliament in question carries out this idea by providing that those shares only which stand in the debtor's name, "in his own right, or in the name of any person in trust for him," shall be subject to a charging order in favour of the creditor. Here the shares stand in the debtor's name, but they stand in his name with the intention that he shall hold them for the true owners. What is there to prevent the true facts being looked at? Two things, and two things only, can prevent it—an estoppel which prevents the debtor from shewing that the shares are not held in his own right, or some illegality which renders the transaction void. There can be no estoppel because it is not suggested that the creditor's position has been in any way altered. Is there any illegality? If it could be shewn that the transaction in its inception, or in the carrying of it out, was illegal by statute or by the common law, it might, perhaps, be said that so far as it was intended to give the beneficial interest in the shares to the three other persons, no effect could be given to it. But there can be no illegality if the intention of the parties was to carry out something which is not contrary to law; and if the view of Sir George Jessel in *Pulbrook* v. *Richmond Consolidated Mining*

Company, Limited (1), be good law there is nothing illegal in an arrangement by which a person, in whose name stand shares of which he is not the beneficial owner, is to give them up to the beneficial owner, even although the articles of association of the company say that the shares must be held in his own right by the person in whose name they stand. According to that view of the law there is, therefore, nothing illegal in the inception or carrying out of the transaction in this case; and, even if that be not the true view, I am not aware of anything which makes such a transaction as this illegal, when all the persons interested are contracting and consenting parties to it. I do not know what principle the plaintiff's counsel intended to suggest should be applied for the purpose of testing whether or not an order of this kind should be made. He argued, however, that we ought not to look at the equities of the case; if the debtor had shares standing in his own name, he could not be heard to say that they really belonged to some one else. But the case of *Re The Blakely Ordnance Co.* (2) is almost identical with this, and is directly in point. It came on by motion, before Malins, V.C., to set aside a charging order like that which has been obtained here. We must apply the same test in order to determine the rights of the parties as Malins, V.C., did in that case. The true facts shewed that the shares, though they stood in the name of the son, were the shares of the father, and the Vice-Chancellor pointed out that there could be no estoppel because there had been no alteration of position, and that effect ought, therefore, to be given to the true rights of the parties. We were pressed with *Cragg* v. *Taylor* (3). That case, however, is clearly different from this on the grounds pointed out by my lord; namely, that the Courts of common law, not having power to administer equitable rights, could not look beyond the apparent ownership on the register of the company. We cannot now, since the passing of the Judicature Acts, act upon that view. We must decide the matter according to all the rights, legal or equitable, of the parties interested. This charging order, which provides

(1) 9 Ch. D. 610. (2) 25 W. R. 111.
(3) Law Rep. 1 Ex. 148.

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that the debt of Griffin shall be paid out of other people's property, must be discharged.

Order nisi discharged.

W. A.

The judgment creditor appealed.

Jelf, Q.C., and *C. Lyttleton Chubb*, for the judgment creditor. The respondents are in a dilemma; either these shares belonged to Griffin or they did not. If they did, then they were standing in his name in his own right, and come within the terms of the Act, so that a charging order is clearly right. If they did not belong to him, then the respondents concurred in committing a fraud on the company, and cannot be heard to allege that the shares belong to them.

[LORD HERSCHELL. Suppose the trust was one which the Court would not enforce against the holder of the shares, does it follow that a charging order can be made for a debt of the holder?]

That is a necessary consequence, for whatever a debtor can keep may be laid hold of by his creditors.

[KAY, L.J. Suppose a person holds shares on a trust, the evidence of which is lost, so that it could not be enforced against him, but he has no thought of repudiating it, can his creditors issue execution against the shares?]

That is different from a case where the creation of the trust is fraudulent. *Birch* v. *Blagrave* (1) supports the view that the transferors could not get their shares back. It is true that in *Pulbrook* v. *Richmond Consolidated Mining Co.* (2), Jessel, M.R., laid down that the expression "in his own right" did not require the holder of the shares to be beneficial owner. That, however, was not necessary for the decision of the case, as the holder of the shares was the beneficial owner, though he had mortgaged them. The object of requiring directors to be holders of a certain number of shares is that they may have a stake in the company sufficient to induce them to look after its interests. The mortgaging the shares, as in *Pulbrook's Case* (2), does not

(1) Amb. 264.

(2) 9 Ch. D. 610.

interfere with this. In *Bainbridge* v. *Smith* (1), Cotton, L.J., dissented from the interpretation put by Sir George Jessel on the expression "in his own right."

Channell, Q.C., and *Wedderburn*, for the respondents, were not called upon.

LORD HERSCHELL. This is an appeal from a decision of a Divisional Court, discharging an order which charged the judgment debtor's interest in shares which stood in his name on the register of a limited company. There is no question that 300 shares are standing in his name as registered owner. The statute 1 & 2 Vict. c. 110, s. 14, authorizes the making a charging order in respect of shares standing in the name of the judgment debtor "in his own right," or in the name of any person in trust for him. The question is raised what is the meaning of the words, "in his own right." It is not necessary to decide what in the abstract is their meaning; they may have different meanings according to the context. Here they occur in juxtaposition with shares standing in the name of another person in trust for the judgment debtor, in an enactment the object of which was to charge shares in which a judgment debtor had a beneficial interest. Here the judgment debtor had 300 shares standing in his name; but three persons allege that he held the shares in trust for them. If that allegation is established, and its truth (apart from the question whether the trust was legal) cannot be doubted, then the case is not within the statute. It is not disputed that these shares were the property of Posno and two others, and that they were transferred into the name of the judgment debtor without any intention of passing more than the legal ownership. The transfers having been made and registered, the debtor executed and delivered to the owners blank transfers of those shares, but he remained on the register. So far there is a clear case of trust. But the judgment creditor sets up the case that though the shares were transferred to the judgment debtor with the intention of only passing the legal interest to him as trustee, the trust was illegal, as it was made in order to qualify the judgment debtor as a director. The fact is beyond dispute. The articles provide that a director must

(1) 41 Ch. D. 462.

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hold 300 shares "in his own right," and the judgment creditor says this means that he must be beneficial owner of them, and that otherwise he is not qualified; he says that when the three respondents transferred to the judgment debtor, they must be taken to have falsely represented that he was the beneficial owner; that being parties to an illegal transaction they could not enforce the trust; and that, therefore, if the transferors had come to the Court to prevent the judgment debtor from dealing with the shares as his own, they must have failed; and that as the judgment debtor could have insisted on keeping the shares as his own, they must be treated as belonging to him absolutely.

The first question is what is the meaning in Art. 67 of the expression "in his own right." The meaning of a similar article was considered by the late Master of the Rolls in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1) Perhaps it was not necessary for the decision of the case before him to lay down that those words did not require the director to be beneficial owner of the shares, for Pulbrook was beneficial owner subject to a mortgage; but the Master of the Rolls put the case on a broader ground. I am not sure whether the decision might not be put on a reasonable basis without going so far as he did, but it is not necessary to decide that question. His Lordship held the words were not introduced to shew that the director must be beneficial owner, but to negative his holding the shares in a representative character. This decision, which was in 1878, remained unquestioned till 1889, when it was discussed in *Bainbridge* v. *Smith.* (2) Cotton, L.J., expressed dissent from the construction adopted by the Master of the Rolls. Lindley, L.J., intimated a doubt whether if it had been res integra he should have taken the same view as the Master of the Rolls, but considered that as the words were in common use and had acquired in consequence of that decision a conventional meaning which had been accepted and acted upon, it would not be safe now to depart from it. So stands the case upon the authorities.

I do not intend to express any opinion whether treating the matter as res integra, the view of the Master of the Rolls was right; but I agree with Lindley, L.J., that having regard to the constant

(1) 9 Ch. D. 610. (2) 41 Ch. D. 462.

transactions depending on the construction of articles of association, it would be dangerous to interfere with a decision which has remained unquestioned for so many years. To do so would be an injustice to persons who have acted on the faith of the decision.

In the present case, I think that the arrangement for qualifying the judgment debtor was not in any way illegal. The opinion given by the Master of the Rolls as to the meaning of a similarly worded rule justified the respondents in the course they took. The most that could be contended for is, that they were mistaken as to what was necessary in order to confer a qualification; it cannot be said that they intended a fraud. It cannot, in my opinion, be established that the cestuis que trust, if they came to a court of justice, would be told, "You cannot have any relief, for you contrived a fraud."

But suppose it could be established that the Court would have refused relief to the cestuis que trust, it does not follow that the creditor of the trustee can attach the trust property. There may be a case where a trust cannot be enforced, but where it would be dishonest not to hold the property upon the trust. Can it be said under these circumstances, where the trustee ought not to keep the property for his own, that his creditor can come in and say that it was the trustee's own property? The creditor, in my opinion, cannot claim more than the trustee could honestly have given him. Here, even if the cestuis que trust could not enforce the trust, still it would not be honest in the trustee to repudiate it, and in my judgment his creditor cannot attach the property.

LINDLEY, L.J. I am of the same opinion. The question is whether these shares come within the description in 1 & 2 Vict. c. 110, s. 14, of "any stock or shares of or in any public company in England standing in his own name in his own right." The words "in his own right," as used in this Act, have been construed as confining the description to shares in which the holder has a beneficial interest. The observations of the late Master of the Rolls in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1), have nothing to do with this statute, and have no bearing

(1) 9 Ch. D. 610.

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on the interpretation of the words "in his own right" in the context in which they occur in the statute.

The judgment creditor finds shares in the company standing in the name of the judgment debtor and seeks to charge them. The judgment debtor says, "They are not mine, for I hold them on trust." If they are not the debtor's property, the judgment creditor has no right to charge them. The judgment creditor replies, "But they are yours, for the alleged trust is illegal." I will not add anything to what Lord Herschell has said in answer to this contention. The appeal will be dismissed.

KAY, L.J. I am of the same opinion. The judgment creditor cannot deny that as between the judgment debtor and the parties claiming to be entitled to the shares, the shares belong to those other parties. But the appellant says that the arrangement was so tainted with illegality that the right of the respondents to the shares could not be enforced. I dissent from that, and I agree with Lord Herschell that for the reasons given by him the trust might have been enforced. The decision in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1) was given in 1878, and was never questioned till May, 1889. These articles of association were dated in March, 1889, and were framed at a time when the law was understood to be that in a clause relating to the qualification of a director the words "in his own right" did not denote that he must be the beneficial owner of the shares. If the cestuis que trust had come to the Court to enforce the trust, saying that the articles were framed on the faith of that decision, it would have been impossible to say that the arrangement was so tainted with illegality as to make the trust incapable of being enforced. Now, if the judgment debtor could not have resisted the claim of the respondents, it is clear that the judgment creditor is in no better position. He is not a purchaser for value, and can have no higher title than the judgment debtor.

Again, though it is not necessary to decide the point, I doubt whether, if the judgment debtor could raise this defence, the judgment creditor could raise it when the judgment debtor does not wish to do so. If there is a trust which by reason of defect

(1) 9 Ch. D. 610.

of proof or anything else short of fraud or actual illegality cannot be enforced, I question whether a judgment creditor can set up the case that it cannot. Here there was nothing in the nature of fraud, there is no reason for saying that the transferors did not act honestly and bonâ fide in the transaction. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Barraud, Rigge & Jupp.*
Solicitors for respondents: *Nicol, Son & Jones.*

H. C. J.

[IN THE COURT OF APPEAL.]

REIN *v.* STEIN.

Practice—Writ—Service out of Jurisdiction—Breach within the Jurisdiction of Contract to be performed within the Jurisdiction—Place of payment—Order XI., *r.* 1 (*e*).

Upon an application under Order XI., r. 1, for leave to issue a writ for service out of the jurisdiction, it appeared that the action was for the price of goods consigned by the plaintiff, a merchant in England, for sale in Germany by the defendant, a German subject carrying on business in Germany. There was no express stipulation as to the place of payment for the goods; but, according to the course of business in similar transactions between the plaintiff and the defendant, such payment would be made in England:—

Held, that there was sufficient evidence that the action was "founded upon a breach within the jurisdiction of a contract which according to the terms thereof ought to be performed within the jurisdiction," and that the plaintiff was entitled to the writ.

APPEAL from an order of the Divisional Court setting aside an order of Collins, J., in chambers, rescinding a previous order by him giving leave to issue a writ for service out of the jurisdiction.

The plaintiffs were the executors of Hubert Joseph Leeuw, who had carried on business at Bankside, Southwark, as a dealer in broken glass under the firm of P. R. Leeuw & Co., and they claimed to recover against the defendant, as his and their agent in Hamburg, the price of several tons of broken glass alleged to have been consigned to him for sale, and sold by him accordingly.

The business, which had been carried on by Leeuw and after

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his death by the plaintiffs, his executors, was that of collecting broken glass from various houses in London and consigning it for sale to various persons abroad for the purpose of being melted down and re-manufactured into glass bottles. The defendant, Simeon Stein, was a German subject carrying on business as a shipbroker at Hamburg, and his course of business with Leeuw for several years had been to give orders, either by personally calling at Leeuw's London warehouse, or by letter from Hamburg, for large quantities of broken glass to be consigned to him and delivered on board his ships in the Thames for conveyance to Hamburg and other places in Germany. Upon the glass being shipped on board the vessels in the Thames, the bills of lading for the same were forwarded to Stein at Hamburg. The defendant then sold the glass on commission, as Leeuw's agent, at Hamburg, and remitted the proceeds to Leeuw's firm by cheque or draft drawn on a London bank, and payable in London. Leeuw's instructions to the defendant were given in writing, the following being a sample :—

"London, Jan. 31, 1891. Mr. Stein, Hamburg. We hereby authorize you to sell for our account about 3000 tons of broken glass at M 1.45 per 100 German pounds, and about 1500 tons broken glass at 95 Pfg. per 100 German lb., delivered c. i. f. [meaning 'charges, insurance, freight,' to be paid by Stein on the arrival of the ship] Hamburg, Harburg, or Altona.—P. R. Leeuw & Co."

After Leeuw's death, his business was continued by his executors, the plaintiffs, who in May, 1891, wrote to the defendant as follows :—

"London, May 16, 1891. S. Stein, Esq., Hamburg. We hereby authorize you to sell 1/500 tons of broken green bottle glass at M. 1.0.5 Pfg. per centner, and not exceeding 200 tons of black bottle glass at 90 Pfennig per centner.

"Prices to be understood c. i. f. Hamburg, Harburg, or Altona: payment cash against bills of lading and insurance policy less 2½ per cent. Shipment by the end of September.

"Your commission to be 4 %. The approximate amount of values of cargoes to be paid in cash: the remainder after the vessel is discharged and the weight ascertained."

On November 6, 1891, Collins, J., in chambers, gave the plaintiffs leave to issue a writ of summons in an action against the defendant for the balance alleged to be due to them for glass consigned to him by them and their testator under the circumstances above stated, and to serve notice of the writ out of the jurisdiction. The affidavit in support of the application stated that there had been a breach of contract by the defendant within the jurisdiction, such breach being non-payment within the jurisdiction for goods delivered within the jurisdiction.

The writ was accordingly issued and served on the defendant in Hamburg. The defendant entered a conditional appearance; and on December 31, Collins, J., upon the defendant's application, made an order rescinding his previous order.

The plaintiffs appealed to the Divisional Court (Cave and Vaughan Williams, JJ.), who held that the first order of Collins, J., allowing the writ to issue, was right, and discharged the order of December 31.

The defendant appealed to the Court of Appeal.

Crump, Q.C., and *Salter*, for the defendant. The case is not within Order XI., r. 1, which provides that service out of the jurisdiction may be allowed whenever "(*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction.". The contract shews that it was altogether a German transaction; the goods were to be consigned to and sold in Germany, and payment was to be made in German money. To bring a contract within the Rule, it must expressly or by implication require that performance shall be within the jurisdiction: *Bell & Co.* v. *Antwerp, London and Brazil Line.* (1)

The contract was essentially a contract to be performed in Germany. The defendant was a mere conduit-pipe through which the plaintiff was to receive the money. The money was to be paid in Germany, and in Germany the defendant was accountable; but for the convenience of the plaintiff the money was sent by

(1) [1891] 1 Q. B. 103.

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the defendant, his agent, to London. That is a matter outside the contract. The duty of the agent was discharged as soon as the goods were sold in Germany, and the contract was completed as soon as the goods were delivered against the acceptances of the purchasers in Hamburg. The sole contract and obligation was to sell the glass in Germany and to see that the money was paid in Hamburg.

Upon the construction of the Rule in question, Cotton, L.J., said, in *Reynolds* v. *Coleman* (1), that the meaning of the words, "which according to the terms thereof ought to be performed within the jurisdiction," is that you must look at the contract and at the facts which existed at the time when it was made, and then determine whether, having regard to its terms, the contract was one which ought to be performed within the jurisdiction. So, in *Bell & Co.* v. *Antwerp, London and Brazil Line* (2), Kay, L.J., said, that you must look at the surrounding circumstances under which the contract was made; but here it is unnecessary to look at the surrounding circumstances, for there is an express contract for performance in Germany. The Divisional Court thought that, by subsequent dealings, there was a new contract; but the Court cannot disregard the original contract or look at any circumstances except those existing at the time of that contract.

[KAY, L.J., referred to *Robey* v. *Snaefell Mining Co.* (3)]

Bankes, and *Herbert Jacobs,* for the plaintiffs, were not called upon.

LINDLEY, L.J. The plaintiffs may be described as persons who sell broken glass and send it abroad to be melted down and made into bottles, and the defendant may be truly and properly described as the agent of the plaintiffs. He lives abroad. According to the letters of January 31, 1891, and May 16, 1891, written to him by the plaintiffs—I treat them as including their testator—the arrangement come to between the plaintiffs and Stein was that Stein should sell, and sell for them in

(1) 36 Ch. D. 453. (2) [1891] 1 Q. B. 103, 109.
(3) 20 Q. B. D. 152.

Germany, consignments of broken glass and remit them the money. Although the letters themselves do not say where the money was to be paid to the plaintiffs, yet the circumstances under which this arrangement was made, and especially the course of business, were plain enough. They shew that the money was to be paid in England. With reference to the fact that the letters do not state where the money is to be paid, I will avail myself of the language of Cotton, L.J., in *Reynolds* v. *Coleman*. (1) He says: "The question we have to consider is this, What is the meaning of 'which according to the terms thereof ought to be performed within the jurisdiction'? It was said by the appellant to mean that it must be an express term of the contract that it should be performed within the United Kingdom. In my opinion, that is not the true construction. The difficulty arises from the words 'according to the terms thereof'; but in my opinion those words mean that you must look at the time when the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction, and do not mean that there must be an express provision that the contract is to be performed within the jurisdiction." Now, before I part with that case, I will make another observation on the construction of clause (*e*) of Order XI., r. 1. I do not understand that it is the whole of the contract that has to be performed within the jurisdiction. It is sufficient if some part of it is to be performed within the jurisdiction, and if there is a breach of that part of it within the jurisdiction; and that was the view taken by the Divisional Court in *Robey* v. *Snaefell Mining Co.* (2), where the action was brought by a firm of engineers in Lincoln for the price of machinery erected in the Isle of Man. No definite place for payment was specified in the contract; but the Court came to the conclusion that one of the terms of the contract was that payment should be made in Lincoln, and, therefore, they gave leave to issue the writ. So here, all the duties of the defendant under his contract, except the duty of paying the plaintiffs, were to be performed abroad; he was to sell abroad, but the most important part of all was payment, and that payment

(1) 36 Ch. D. 453, 464. (2) 20 Q. B. D. 152.

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was to be made here. I should infer that payment was to be made in London from the circumstances existing at the time when the letters were written; but it does so happen that the course of business pursued by the defendant since the dates of those letters leads to the inference that part of the defendant's duty under this contract was to pay the plaintiffs in England. In my opinion, the decision of the Divisional Court was correct, and the learned judges were perfectly right in allowing the writ to issue.

KAY, L.J. I am of the same opinion. The breach of contract for which this action is brought is the non-payment of certain moneys by the defendant which he was bound by the contract to pay. Looking at the contract and the circumstances under which the money was to be paid, if the money had to be paid in this country, then, according to the authorities, the case falls within the rule which has been referred to, and the non-payment by the defendant was a breach of a contract part of which was to be performed in England. The question is whether there is enough in this contract to enable us to come to the conclusion that payment was to be made in England. I have no doubt about it. In the first place, the contract is between a merchant in England and a person who is constituted his agent in Hamburg. Goods were consigned to the latter to be sold; and the very terms of one of the letters under which the contract was made are these: "Cash against bills of lading." The letter does not say that the agent is to pay cash abroad, or that the agent abroad is to be paid, but that the cash is to be paid to the principal. Primâ facie, in commercial transactions, when cash is to be paid by one person to another, that means that it is to be paid at the place where the person who is to receive the money resides or carries on business. I therefore think that "cash" must mean cash to be paid in England. The letter I have already referred to says that part of the value of the goods is to be paid in cash, and that the rest is to be paid when the whole of the goods has been delivered. The exact words are these: "The approximate amount of values of cargoes to be paid in cash: the remainder after the vessel is discharged and the weight ascertained." So that, before the

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vessel was discharged, it would be the duty of the plaintiffs' agent in Hamburg to remit part of the values of the cargoes in cash, and the rest afterwards. It has been truly said that the only circumstances to look at are the circumstances existing at the time of the contract. The circumstances existing at the time were these. One of the parties was resident in England, and the other party, who was resident in Hamburg, was to pay the party resident in England in cash. It is clear what the course of dealing between the parties was: it was that the party resident in Hamburg should remit the value of the goods in cash to England. Therefore, the breach of contract now complained of was in England, and accordingly the writ ought to be allowed to be issued, and notice of it served out of the jurisdiction.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *R. Greening; Emanuel Round & Nathan.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

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IN RE LILLEY.

Solicitor—Misconduct—Inquiry—Incorporated Law Society, Committee of—Report—Exoneration of Solicitor—Costs—Jurisdiction—Solicitors Act, 1888 (51 *&* 52 *Vict. c.* 65), *ss.* 12, 13.

By the Solicitors Act, 1888 (51 & 52 Vict. c. 65), s. 13, an application to strike the name of a solicitor off the roll or to require him to answer allegations in an affidavit is to be heard by a committee of the Incorporated Law Society, who are to embody their finding in a report to the High Court, and the report is to have the same effect and to be treated by the Court in the same manner as a report of a master of the Court, and the Court may make such order thereon as to the Court may seem fit.

Upon an application against a solicitor under s. 13, founded on charges of misconduct, the committee of the Incorporated Law Society, after hearing the case, made a report to the Court exonerating the solicitor from the charges affecting him:—

Held, that the Court had jurisdiction to order the applicant to pay the solicitor his costs of the inquiry before the committee.

APPEAL from an order of the Divisional Court.

In this case certain clients of a solicitor laid a complaint

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against him before the Incorporated Law Society. The statutory committee of the society, under the powers vested in them by ss. 12 & 13 of the Solicitors Act, 1888 (51 & 52 Vict. c. 65), investigated the matter, and eventually made a report exonerating the solicitor. This report was duly filed at the Central Office, pursuant to r. 8 of the rules of 31st of January, 1889 (W. N. 1889), issued under the Act, but beyond that the committee took no further proceedings in the matter. The solicitor then moved in the Queen's Bench Division for an order upon the clients to pay him his costs of the inquiry before the committee. The motion was heard before Denman and Cave, JJ., sitting as the Divisional Court, who held—Cave, J., doubting—that s. 13 of the Act gave the Court by inference, though not in express terms, jurisdiction to award costs, as under the old practice when the inquiry into charges against a solicitor was made before a master; and they accordingly made an order on the motion giving the solicitor his costs. The clients appealed.

Arnold White, for the appellants. The question is whether s. 13 of the Solicitors Act, 1888, gives the Court jurisdiction to deal with the costs of such an inquiry as this before the statutory committee of the Incorporated Law Society appointed under s. 12. Sect. 13 makes no mention of costs; and, moreover, the rules under the Act make no provision as to the costs of an inquiry, except that r. 5 provides that the committee may, if they think fit, appoint a solicitor to represent the applicant on the inquiry, and that the costs of such solicitor may be paid out of the funds of the Society. Costs are the creation of statute, and unless you find a statutory power for the Court to give costs, the Court cannot give them. If the respondent, the solicitor, relies on the provisions of the Judicature Acts as to costs, the answer is that those provisions relate only to the costs of proceedings in the Supreme Court, whereas an inquiry of this kind before the statutory committee is outside the Court altogether, and is intended to be so. Under s. 13 the Court has no jurisdiction unless the society brings the report before it, and here that has not been done, the Society having under the section the right to abstain, if no primâ facie case is made out against the solicitor, from

taking any further proceedings beyond the filing of the report under the rules.

Hollams, for the solicitor, was not called upon.

LINDLEY, L.J. This case is a very simple one. Some clients made accusations against their solicitor. Those accusations have been investigated by the committee of the Incorporated Law Society, a committee which has been created under the Solicitors Act, 1888; and that committee has made a report exonerating the solicitor entirely from the charges made against him. Now comes the question whether there is any method by which the solicitor can obtain from those who improperly made those charges the amount of the expense to which he has been put in meeting them. This question turns on the 13th section of the Solicitors Act, 1888. By s. 13 "An application to strike the name of a solicitor off the roll of solicitors . . . . or an application to require a solicitor to answer allegations contained in an affidavit, shall be made to and shall be heard by the committee . . . . The committee, after hearing the case, shall embody their finding in the form of a report to the High Court of Justice." Then by the rules under the Act that report is to be filed; that is merely for safe custody. What the committee are to do is to make a report to the High Court of Justice. Then the section proceeds: "If the committee are of opinion that there is no primâ facie case of misconduct against the solicitor, the Society need not take any further proceedings": that is, they may leave the matter alone. But the committee are to make a report; that is their duty, and if there is nothing further to be done the Society need not take any further proceedings. On the other hand, if the committee are of opinion that there is a primâ facie case, the section goes on to say that "it shall be the duty of the Society to bring the report of the committee before the Court": that is to say, if the committee thinks the accusation made against the solicitor is well founded, then it is the duty of the Society to take the matter up and bring it to the notice of the Court on the report so made. The section further provides that "The report shall have the same effect, and shall be treated by the Court in the same

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manner, as a report of a master of the Court, and the Court may make such order thereon as to the Court may seem fit. Provided that any person who but for this Act would have been entitled to apply to the Court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled so to apply although the committee is of opinion that there is no primâ facie case of misconduct against the solicitor." That is to say, although the report is in favour of the solicitor, the person complaining of that solicitor is not bound by that report; he may insist upon proceeding against the solicitor in Court, notwithstanding the report, and endeavour to convince the Court that the report is wrong.

Then the section proceeds: "And shall be entitled to be heard if the Society brings the report of the committee before the Court." That obviously means this, that, when the Society has a report adverse to a solicitor and brings that report to the attention of the Court, as it is required to do by the earlier part of this section, then the person complaining shall be entitled to be heard, although the Society, I suppose, would have the conduct of the case. This latter part of the proviso does not and cannot apply sensibly, to a case in which the person complaining of the solicitor acts upon the right given him by the early part of the proviso, that is to say, himself appeals to the Court.

Now, to come back to the jurisdiction of the Court. It has been contended that the Court has no jurisdiction unless the Society brings the report before the Court. I cannot find any words which justify that argument. There are no words which make the bringing up of the report by the Society a condition precedent, and to impose such a condition would be contrary to the real meaning of the legislature in passing this section. If the contention is right, it would have the effect of preventing the Court doing anything upon the report, although the report is on its own records, simply because the Society might not think fit to go on, the statute saying they need not do so unless they like, for, when dealing with a report in favour of a solicitor, the duty of the Society is simply to file it, and there their duty stops. But then the statute says that "the

report shall have the same effect, and shall be treated by the Court in the same manner, as a report of a master of the Court." The section means exactly what it says; the report being on the files of the Court, it is to be treated like a master's report: "And the Court may make such order thereon as to the Court may seem fit." Now, with reference to those words, bearing in mind what the jurisdiction of the Court was under the old practice, I think the intended and the true effect of this section is only to substitute the report of the committee for that of the master. In saying that the Court may make such order upon the report as may seem fit to it, the section gives jurisdiction over the costs as well as everything else connected with or relating to the report. Of course, the Court, in exercising the power thus conferred upon it, would inquire into the circumstances dealt with by the report, and look at the report itself. It might be that the report would shew that there had been such conduct on the part of the solicitor concerned as to have raised suspicion, and thereupon the Court might think it not right to give him his costs. It is quite possible that the report might exonerate him, and yet shew that his conduct was so open to misconstruction that he had brought the inquiry on himself. The Court might also ascertain whether the complainant intended to appeal against the report. The Court would inquire into all those matters before it made any order. I think it abundantly plain that the language of this section gives the Court jurisdiction to make the person who has made the improper charges against the solicitor pay the costs of the inquiry before the committee, and there is no reason why he should not pay them. For these reasons I am of opinion that the Divisional Court was right, and that the appeal should be dismissed with costs.

KAY, L.J. The main point made by the counsel for the appellants was this: the inquiry before the Incorporated Law Society is, he says, a proceeding which is instituted by statute, and which takes place entirely outside the Court, and, in order to give the Court jurisdiction to direct what shall be done with regard to the costs of that inquiry, you must find some express words in the Act. I think that a very fair statement

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of what the law must necessarily be. It was said that under this provision the Society need not bring the report before the Court unless it makes a primâ facie case against the solicitor. That is true enough; but the section only says they need not do so; they may do so in the case of a complete exoneration of the solicitor; there is nothing to prevent them; and, whether they bring it before the Court or not, the report has to be filed. That seems to be prescribed by the rules made under this Act; and therefore, whether the Society brings it before the Court or not, the report becomes part of the record of the Court. The fallacy of the argument is in treating that paragraph of s. 13 of the Act which begins, "The report shall have the same effect," as though it only applied to a case where the Society brings the report before the Court. I think it applies whether the Society brings the report before the Court or not. The paragraph says, "The report"—that is, the report made—"shall have the same effect, and shall be treated by the Court in the same manner, as a report of a master of the Court." It is not a report of a master of the Court, but it is to be treated in the same manner as if it were. Now, pausing there, even if it were a report of a master, the Court would have complete jurisdiction over the costs; and if it is to be treated in the same manner as a report of a master, the meaning must be that the Court shall have the same jurisdiction over the costs of obtaining that report as if it were a report of a master. The matter is made much more plain by the words which follow: "And the Court may make such order thereon as to the Court may seem fit." Now, it may be that the Society has not brought the report before the Court. The Court, it is argued, must be put in motion by some one; but, the report being upon the file, why should not any one who has an interest in the matter—the solicitor in this case—come to the Court and say, "There is a report upon your file, a report in my favour, a report the obtaining of which has put me to considerable costs; that report is to be treated as a report made by a master of the Court, and the Court has jurisdiction to make such an order thereon as may seem fit. I ask the Court to make an order that my costs be paid by the other party"? It seems to me that is exactly within the words. After carefully considering the matter, I agree

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with the decision of the Divisional Court and I do not feel the same doubt that Cave, J., seems to have felt about it. It certainly is expedient, if the statute will bear that meaning, to hold that the Court should have jurisdiction in such cases over the costs. One might imagine a very troublesome and expensive inquiry into the conduct of a solicitor, and he might be exonerated from all the charges against him. As the Act does not impose upon the Society the duty of bringing the matter before the Court, the Society might leave the matter on the report without doing anything further; and it would be hard if the solicitor, in a case of that kind, had no means of coming to the Court and saying, "The person who made these charges against me, and put me to all this expense, ought to pay the costs of these proceedings, and I ask the Court to make him do so." I think that is not only the grammatical and fair construction of the statute, but by far the most expedient construction to put upon it.

Appeal dismissed.

Solicitors: *Houseman & Co.; H. L. Lilley.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

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THE STAMFORD, SPALDING AND BOSTON BANKING CO. *v.* SMITH.

Limitations, Statute of (21 *Jac.* 1, *c.* 16)—*Acknowledgment—Part Payment to a Stranger—Promissory Note—Indorsement by Payee—Part Payment to Payee after Indorsement.*

In an action by the indorsees against the maker of a promissory note, it appeared that after the indorsement and within six years of the commencement of the action, the defendant made a payment on account of the note to the payee, who had no authority to receive the money on behalf of the plaintiffs:—

Held, that such payment was not a sufficient acknowledgment to take the case out of the Statute of Limitations.

Clark v. *Hooper* (10 Bing. 480) considered and distinguished.

THIS was an appeal from a judgment of Vaughan Williams, J., on the trial of an action without a jury at the Northampton Assizes, 1891.

The defendant, on October 9, 1879, gave a promissory note

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promising to pay Charles Konow or order on demand 200*l.* with interest at 5*l.* per cent.

At that time Konow had an account at the Northamptonshire Union Bank, and this note was indorsed by Konow and handed to the bank with other securities, to cover his account which was overdrawn. In January, 1882, the account was transferred to the plaintiffs' bank, who paid the overdraft to the Union Bank, and received from them the securities, including the promissory note, which was duly indorsed to them. Konow's account with the plaintiffs' bank was always overdrawn, and interest was charged on it at six months' intervals and added to the account for which the securities were held. No notice was given to the defendant Smith of the indorsement of the note to the Union Bank or to the plaintiffs.

The defendant paid the amount of the bill to Konow by instalments of principal and interest, commencing in 1883; but Konow did not inform the plaintiffs of these payments except on one occasion, namely, in November, 1885, when the defendant paid him an instalment of 50*l.*, and Konow paid the money into the plaintiffs' bank and informed the manager that the defendant had paid him 50*l.* off the note. The manager then made a special note in the bank's list of securities to the following effect: "November 9, 1885. Mr. Konow said he had received 50*l.* on account"; and Konow was credited in his account with that sum. In December, 1889, the defendant paid Konow the last instalment due on the note and took from him a receipt for the whole amount; but Konow did not give up the note to him, but told him that he would destroy it.

In 1890 Konow died, and his estate was insolvent. The plaintiffs applied to the defendant for payment of the note, and ultimately brought this action against him in the early part of 1891 claiming the amount of the promissory note, less the 50*l.* which they had received, with interest.

The defendant pleaded the Statute of Limitations, and the plaintiffs relied on the payment of 50*l.* in November, 1885, as an acknowledgment taking the case out of the statute.

The learned judge gave judgment for the defendant, and the plaintiffs appealed.

Lindsell, (*W. Graham*, with him), for the plaintiffs. The payment by the defendant to Konow in 1885, and the payment by Konow to the plaintiffs, were a sufficient acknowledgment of the debt to take the case out of the Statute of Limitations. Konow was not a mere stranger; he received the payment as part payment of the note, and the money was paid to him on the supposition that he was the holder of the note. The intention with which the payment is made must determine whether it has the effect of a fresh promise to pay. Here the intention was quite clear that the payment should be made not to Konow personally, but to the true holder of the note. It is very similar to *Clark* v. *Hooper* (1), where interest on a debt was paid to a person as the administratrix of the creditor, but it turned out that the person receiving the money had not taken out administration in the proper diocese, and, therefore, had no right to receive the money. It was there held that the payment of interest was a sufficient acknowledgment to defeat the plea of the Statute of Limitations. Moreover, it must be taken that Konow accepted the payment as the plaintiffs' agent; for they adopted the payment by accepting the amount in reduction of Konow's debt to them: *Megginson* v. *Harper*. (2)

Etherington Smith, and *Raymond*, for the defendant. The payment of the instalment in 1885 was not an acknowledgment of the debt, as it was paid to a party who had no right to receive it. An acknowledgment is only evidence of a promise to pay; there could be no such promise here, for there was no debt owing to Konow: *Tanner* v. *Smart* (3); *Grenfell* v. *Girdlestone* (4); *Megginson* v. *Harper* (2); *Howcutt* v. *Bonser* (5); *Davies* v. *Edwards* (6); *Godwin* v. *Culley* (7); *Green* v. *Humphreys* (8); *Morgan* v. *Rowlands* (9); *Mitchell's Claim* (10); *Cripps* v. *Davis*. (11) In *Clark* v. *Hooper* (1) the want of title in the administratrix was merely a technical one; the interest was paid as due to the intestate's estate, and she could at any time have perfected her title by

(1) 10 Bing. 480.
(2) 2 Cr. & M. 322.
(3) 6 B. & C. 603.
(4) 2 Y. & C. 662.
(5) 3 Ex. 491.
(6) 7 Ex. 22.
(7) 4 H. & N. 373.
(8) 26 Ch. D. 474.
(9) Law Rep. 7 Q. B. 493.
(10) Law Rep. 6 Ch. 822.
(11) 12 M. & W. 159.

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taking out administration in the right diocese. If the case goes beyond that it is not good law.

If Konow received the payment as agent for the plaintiffs, he must have received all the other payments in the same capacity. In that case the whole debt on the note is paid off. The plaintiffs cannot adopt one payment without adopting the others.

Lindsell, in reply.

LORD HERSCHELL. In this case the defendant gave to Konow a promissory note for 200*l.* for value. Konow indorsed the note to the Union Bank as security for his account; and this account was paid off by the plaintiff bank, and the note was indorsed to them. When this action was brought by the plaintiffs the debt was barred by the Statute of Limitations; but the plaintiffs seek to avoid the operation of the statute by part payment by the defendant in respect of the note. The payment relied on was in 1885; and if that payment was a sufficient payment, it was within six years of the commencement of the action, and, therefore, the statute could not be a bar. But the payment was not made to the plaintiffs; it was made to Konow. The plaintiffs contend that the payment, being made on account of the debt to Konow, amounted to an acknowledgment that the remainder of the debt was then due, and that the acknowledgment enured to the benefit of the plaintiffs. Subsequently, and before this action was brought, the remainder of the debt was paid to Konow by the defendant, who was not aware of the indorsement of the note. The argument on behalf of the plaintiffs is that, although the payment in 1885 was not made to Konow intentionally as agent for the Union Bank, or with the knowledge that they had any interest in the note, but in the belief that the debt was still due to Konow, nevertheless the plaintiffs could take advantage of the payment, and that a promise may be inferred to pay the remainder of the debt to any one who is entitled to sue upon the note. It cannot be disputed that an acknowledgment, in order to exclude the operation of the statute, must be absolute and unconditional, and one from which a promise to pay the debt can be inferred. But it was argued that if an acknowledgment is in fact made, it is immaterial to whom

it is made. Such appears to have been considered the law at one time, and there are certainly some dicta to that effect; but that is not the law now. In my opinion, since the decision in *Tanner* v. *Smart* (1), it has been abundantly settled that an acknowledgment to a stranger is not sufficient. It must be to the creditor or his agent, to some one who was entitled to receive payment of the debt, and to whom you could presume a promise to pay the debt. This was laid down in the judgment of Pollock, C.B., in *Godwin* v. *Culley*. (2) The case specially relied on by the plaintiffs was *Clark* v. *Hooper* (3), where a payment had been made to a person as administratrix, who had not in fact taken out administration in the proper diocese. There were, doubtless, in that case dicta by Tindal, C.J., and Park, J., that the payment had the same effect as an acknowledgment to a third person, which seems to have been thought by those judges sufficient. But I do not think that at the present time the decision can be supported on that ground. If, then, an acknowledgment, in order to be sufficient, must amount to a promise to pay made either to the creditor or his agent, it would seem à fortiori that a payment must be made to the creditor or his agent. It would be a misuse of language to call it a payment unless it was made to the creditor or his agent. Unless it was a discharge of the liability it was not a payment at all. The money might pass, but there was no discharge of the debt unless it was received by the person to whom it was due or by an agent on his behalf. There may be an exception to the rule in the case of a payment to a person filling a representative capacity, or who was believed to fill that capacity; in such a case the payment might enure for the benefit of the persons for whose benefit it was believed to be made. This would support the decision in *Clark* v. *Hooper*. (3) The payment there was made to the administratrix in her representative capacity, with the intention that it should enure for the benefit of the estate of the intestate, and when a proper administration was taken out the administratrix would be able to take advantage of the payment. Unless *Clark* v. *Hooper* (3) can be supported on that ground, I do not think it

(1) 6 B. & C. 603.
(2) 4 H. & N. 373.
(3) 10 Bing. 480.

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can be supported consistently with other decisions. At the time when the payment was made there was no other representative of the estate, there was no other person to whom the payment could have been made, and the intention of the debtor was to make the payment to the estate, not to the individual who received it. However, in my opinion there is now no question that a payment or acknowledgment must be made to the creditor or his agent.

In the present case, when the defendant made the payment to Konow in 1885, it is clear that he did not intend to pay it to him as the representative of the Union Bank, or in any representative capacity, but thinking that he was discharging his liability to Konow. There was no acknowledgment or implied promise to any one but Konow. The plaintiffs could only establish their case by shewing that Konow was the agent of the bank. But at that time he was not their agent; the payment did not discharge the defendant's liability, and the bank might have sued him the next day for the whole amount. But it was argued that the bank afterwards adopted the transaction and accepted Konow as their agent to receive the money. I am not satisfied that this would be sufficient; but, if it would, the plaintiffs are in this difficulty, that if the bank adopted Konow as their agent for receiving the payment in November, 1885, they could not repudiate the subsequent transactions in which Konow, acting just as he had done before, received other payments from the defendant, he having no notice that the agency was put an end to. In that case the note was entirely discharged. On these grounds, I think that the plaintiffs have not shewn anything to exclude the operation of the statute, and, consequently, that it is a bar to their claim. The appeal must, therefore, be dismissed.

LINDLEY, L.J. I am of the same opinion. It would be very hard if the defendant were compelled to pay the note over again when he had honestly paid the person whom he believed to be his creditor. This is one of the few cases in which the Statute of Limitations comes to the aid of a man who has an honest defence. The facts of the case are not disputed. The only question is whether the payment by the defendant to Konow in

1885 was such an acknowledgment of indebtedness to the plaintiffs as is required to take the case out of the Statute of Limitations. It was formerly thought that an acknowledgment to a third person was sufficient, but it is now well established that it is not sufficient. *Tanner* v. *Smart* (1) established that, and I take it to be perfectly settled that there must be payment to the creditor or some one who is his agent. Nor is there any case which throws any doubt upon that rule except *Clark* v. *Hooper* (2), in which the payment was made by a mistake of both parties. It was intended to be made to the administrator of the creditor, and it was made to one who was an administrator, but not in that diocese. I agree that if that decision be rested on the ground that a payment to a third party was sufficient, it cannot be sustained, but on the facts of the case I see no reason to question the decision.

KAY, L.J. I also am of the same opinion. The short ground of my decision is that the money handed to Konow was not payment of part of the debt. Lord Tenterden's Act only excepts payments of principal or interest from which a promise to pay might be presumed before the Act. A promise to pay never could have been presumed, before the Act, from a payment to a third party. It must have been a payment in discharge of part of the debt. Therefore, such a handing over of money as took place in the present case (I do not call it a payment, for it was not a payment) could not properly be an acknowledgment sufficient to prevent the operation of the Statute of Limitations. I therefore agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Smith, Fawdon, & Low, agents for Becke & Green, Northampton.*

Solicitors for defendant: *Powell & Rogers, agents for W. B. & W. R. Bull, Newport Pagnell.*

M. W.

(1) 6 B. & C. 603.

(2) 10 Bing. 480.

C. A.
1891
June 17.
1892
April 7.

[IN THE COURT OF APPEAL.]

TRUSTEE OF WOOLFORD'S ESTATE *v.* LEVY.

Bankruptcy—Execution, Goods taken in—Receiving Order—Absence of request by Official Receiver or Trustee to Sheriff to deliver up Goods—Duty of Sheriff to Sell—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 45, 46 *—Sheriff, demand of excessive Fees by—Penalty—Claim in Account made subject to Taxation—Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55), *s.* 29 (2) (*b*).

Sect. 45 of the Bankruptcy Act, 1883, provides that, where a creditor has issued execution against the goods or lands of a debtor, he shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor, unless he has completed the execution before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. Sect. 46 provides that, where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order.

After goods had been seized by the sheriff under a writ of fieri facias, a receiving order was made against the judgment debtor, of which notice was given to the sheriff. The official receiver did not, however, request the sheriff to deliver up the goods; but told him to realize them to the best advantage. The sheriff's officer having proceeded to sell the goods under the writ of fieri facias, the trustee in bankruptcy subsequently appointed brought an action against him for wrongfully selling the goods:—

Held, that, the official receiver having elected not to request the sheriff to deliver up the goods, the sheriff was right in proceeding with the sale of the goods under the writ, and the action could not be maintained.

The Sheriffs Act, 1887, s. 29 (2) (b), imposes a penalty upon a sheriff, under-sheriff, bailiff, or officer of a sheriff, if he "takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of this or any other Act."

The sheriff's officer having sold the goods as above mentioned was requested to send in to the official receiver an account of the sale. He sent in an account, in which he claimed to deduct from the proceeds of the sale certain amounts in respect of his charges of the execution. The official receiver thereupon requested him to bring in his charges for taxation, and he accordingly took steps to obtain taxation of such charges, which, however, was resisted by the trustee in bankruptcy, who had in the meantime brought an action for the penalty. Ultimately he obtained an order for taxation of his charges, and upon such taxation a large amount of the sum claimed in his account was taxed off as excessive:—

Held, that under the circumstances of the case the claim made by the sheriff's officer in his account must be taken to have been made subject to

and in contemplation of taxation, and did not amount to a taking or demand of money within the above-mentioned enactment, so as to render the sheriff's officer liable to a penalty.

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ACTION by the trustee in bankruptcy of the estate of Messrs. Woolford & Son, against an officer of the sheriff of London for an illegal sale of goods, for negligence in the sale of goods under a fieri facias, and for a penalty under the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29 (2) (*b*), for taking or demanding money or reward other than the fees or sums allowed by or in pursuance of statute.

The facts as proved at the trial before Cave, J., without a jury were, so far as material, as follows.

In July, 1889, two writs of fieri facias were issued on judgments against Messrs. Woolford & Son, and the defendant received warrants to levy under them. On July 15, the defendant seized goods of the judgment debtors under those writs. Three other writs of fieri facias against the debtors were subsequently lodged with the sheriff. A sale of the goods was advertised, but by arrangement between the judgment creditors and the judgment debtors the sale was postponed, the sheriff remaining in possession. On October 24, a receiving order was made against the judgment debtors, and on October 30, notice of such order was given to the defendant by the official receiver. On November 5, the defendant received a letter from the official receiver, stating that the receiver, after considering his valuer's report, was unable to give the sheriff the usual notice to withdraw, and must leave him to realize the goods to the best advantage and account to the official receiver in due course. The defendant sold the goods on November 11, when they realized the sum of 112*l.* 12*s.* 7*d.* (1) On November 26, the official receiver wrote to the defendant, asking for an account of the sale. On November 28, the defendant sent to the receiver an account, which, after deductions for the defendant's charges and other matters, shewed a balance of 1*l.* 7*s.* 1*d.* in favour of the estate. On December 2, the official receiver wrote to the defendant

(1) It is not necessary to state the facts with regard to the claim for negligence in the conduct of the sale, as the questions in respect of that part of the case were merely questions of fact immaterial to this report.

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requesting him to bring in his charges for taxation. On December 5, the judgment debtors were adjudicated bankrupts, and on January 4, 1890, the plaintiff was appointed trustee in the bankruptcy. On February 25, the plaintiff's solicitors wrote to the defendant threatening an action. On February 26 the defendant obtained an appointment to tax his charges before the taxing-master in bankruptcy, and sent notice of such appointment to the official receiver and the plaintiff's solicitors. On February 27 the writ in the action was issued.

On March 4 the taxation was adjourned until the 6th, on which day the master refused to tax on the plaintiff's objection that, a trustee in bankruptcy having been appointed, and an action being now pending, the official receiver and the taxing-master had no power to deal with the matter. On March 27, a further application for taxation of his charges was made by the defendant to the taxing-master in bankruptcy, and refused on the objection of the plaintiff. On May 13, the sheriff was ruled to return the writs under which he had seized, and, having been so ruled, the defendant obtained an order from a master at chambers on May 18, for the taxation of his charges, notwithstanding that the plaintiff again opposed such taxation. The taxation accordingly took place, and was completed on August 6. The result of it was that of the amount deducted by the defendant in respect of his charges, in the account rendered by him of the sale, the sum of 72*l.* 13*s.* 6*d.* was disallowed. On November 8, the sheriff made his return to the writ, in which he stated that he had taken the amount allowed for his fees and expenses, and had a balance of 61*l.* 16*s.* 1*d.* in hand for the plaintiff.

Asquith, Q.C., and *C. Johnston Edwards*, for the plaintiff.
Cock, Q.C., and *Rose Innes*, for the defendant.

Cur. adv. vult.

1891. June 17. CAVE, J. This was an action, first, for an illegal sale; secondly, for a negligent sale; and, thirdly, for a penalty under the Sheriffs Act of 1887. In July, 1889, the defendant received a warrant to levy for 615*l.*, and he accordingly seized goods, but remained in possession by arrange-

ment with the defendant in the action. On October 24, a receiving order was made against Woolford, and on the 30th notice of that receiving order was given to the sheriff. On November 5, he applied to the official receiver to know what he was to do, whether he was to withdraw from the execution or what. The official receiver, in a letter of November 5, said that he was unable to give him instructions to withdraw under the circumstances, and he had better realize to the best advantage. Now that letter, of course, at once puts an end to any case that the sale was illegal, as it was the clear duty of the sheriff, after the receipt of that letter, to do his best to sell, and realize the goods. There was a sale on November 11, 1889, when a sum of 112*l.* was realized.

Now the second ground of complaint was that the sale was negligent, first, because it was insufficiently advertised; secondly, because the goods were insufficiently described; and thirdly, because they were improperly lotted. [The learned judge discussed the facts as to this part of the claim, and found that there was no evidence of any negligence in the conduct of the sale.]

Then thirdly, as to the penalty. On November 26, an account of the sale was asked for by the official receiver. On November 28, an account was sent shewing, after deductions made for one thing and another, a balance due to the official receiver of 1*l.* 7*s.* 1*d.* only. On December 2, the defendant was asked to bring in his charges for taxation. On January 4, 1890, the present plaintiff was appointed trustee. On February, 25, 1890, there was a threat of an action, the solicitor for the plaintiff saying that he would wait till the 27th before taking proceedings. On the 26th the defendant got and sent to the trustee an appointment to tax on March 4 next. Notwithstanding that appointment a writ was issued on February 27, and when March 4 came the taxation was adjourned to the 6th, on which day the master declined to tax on the trustee's objection that he had no power to do so. On March 27, another application was made to the master to tax, which was also refused at the instigation of the trustee. On May 13, the sheriff was ruled to return the writ, and having been ruled to return the writ on the 18th he obtained an order to tax. The taxation was begun

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on July 1, and completed on August 6, when the large sum of 72*l.* 13*s.* 6*d.*, claimed by the sheriff was disallowed. On November 8, the sheriff made his return, in which he stated that he had taken so much for his fees and expenses, and that he had a sum of 61*l.* 16*s.* 1*d.* in hand ready to be delivered to the trustee. On November 15, the defendant sent a cheque for 41*l.* 10*s.* 7*d.* Why that was not for 61*l.* 16*s.* 1*d.* I do not know, nor is it material at all for this action to ascertain.

The claim was made under the Sheriffs Act of 1887, s. 29, which enacts that, if a person being a sheriff or sheriff's official "takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of this or any other Act," he shall be liable to certain punishments, amongst others, to a penalty of 200*l.*, which is what is now sued for. It is clear there has been no taking here of any fee. The defendant, as it was his duty to do, had realized 112*l.* An account was sent in, it is true, on November 28, 1889, but there was no taking till after the taxation had been completed, and indeed there is nothing to shew any taking till November 8, 1890, when the sheriff made his return. That undoubtedly did amount to a taking, but that is not complained of, and was not till long after action was brought. Has there been any demand within the meaning of the section? That depends on whether "demands" in the section refers to a demand of fees by the sheriff as a condition of doing the work which he is bound to do, or a claim after the work has been done to retain certain of the moneys levied as and by way of fees. The present Act is a consolidation Act, and provisions somewhat similar to those of s. 29 appear to be found in 29 Eliz. c. 4, and 1 Vict. c. 55, s. 3; and it is said in *Woodgate* v. *Knatchbull* (1) by counsel arguendo, that the mischief intended to be remedied by the Act of Elizabeth was the negligence of sheriffs in executing process, and persons who had recovered judgment being obliged to pay money to sheriffs in order to induce them to do their duty properly in levying the sums recovered. However this may be, the section is a highly penal one, and when the word "demands" may be satisfied by holding that it applies to a demand for an extor-

(1) 2 T. R. 148–153.

tionate fee as a condition of doing the work, I cannot think that I am contravening the Act in holding that it does not apply to a mere claim subject to taxation, which it is obvious from the correspondence and from what afterwards took place was what was intended here. As however the claim made was an outrageous one, I think I ought to mark my sense of the defendant's conduct by giving him judgment without costs, except such costs as he may be entitled to in respect of the issues as to the illegal sale and the negligent sale, which I have found in his favour.

The plaintiff appealed.

1892. April 7. *Barnes, Q.C.*, and *C. Johnston Edwards*, for the plaintiff. The defendant could not legally proceed to a sale of the goods after notice of the receiving order. The 9th section of the Bankruptcy Act, 1883, provides that, after a receiving order has been made, no creditor shall have any remedy against the person or property of the debtor, except as directed by the Act. Then s. 45 provides that, where a creditor has issued execution, he shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor, unless he has completed the execution before the date of the receiving order, and before notice of any bankruptcy petition or of the commission of an act of bankruptcy; and by s. 46, where goods have been taken in execution, and before sale of them notice of the receiving order is served on the sheriff, he is on request to deliver the goods to the official receiver or trustee under the order. It is contended that the effect of the legislation is that, when the receiving order has been made and notice of it given to the sheriff, the execution is at an end, and no sale by the sheriff can take place under it. After the receiving order, the goods are no longer the goods of the judgment debtor. They belong to the receiver or trustee. They, therefore, cannot be sold under the execution against the judgment debtor. [They cited on this point *In re Dickenson, Ex parte Charrington & Co.* (1)] Secondly, the defendant has incurred the penalty imposed by

(1) 22 Q. B. D. 187.

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the Sheriffs Act, 1887, s. 29, sub-s. 2 (*b*), by "taking or demanding money or reward other than the fees or sums allowed by this Act or any other Act." The learned judge below found that he had made an outrageous claim. He "took" or "demanded" the amount which he deducted from the proceeds of the sale in the account which he sent in to the receiver.

[FRY, L.J. Was the mere rendering of an account at the request of the receiver a "demand" of money within the statute? Was not the account sent in merely as shewing what the defendant claimed subject to taxation?]

It is submitted that the claim in the account to deduct money to which the defendant was not entitled by way of fees from the proceeds of the goods is a demand within the statute. The penalty is not confined to cases where money is demanded by the sheriff as a condition of doing his duty. [They cited on this point *Woodgate* v. *Knatchbull.* (1)]

Cock, Q.C., and *Rose Innes*, for the defendant, were not called upon.

LORD ESHER, M.R. The questions in this case are, first, whether there was an illegal sale of the goods taken in execution; and, secondly, whether the defendant has made himself liable to a penalty under the Sheriffs Act, 1887, by an illegal demand.

With regard to the first question, the plaintiff vouches certain provisions of the Bankruptcy Act, 1883. The facts are these. A writ of fieri facias against the goods of Woolford & Son having been delivered to the sheriff, the goods in question were seized under it; and, while they were in the hands of the sheriff, and before they were sold, a receiving order was made against the judgment debtors, of which notice was given to the sheriff. It is said, that under the circumstances, the sale by the sheriff was illegal, because, instead of selling the goods of the judgment debtors, he was selling the goods of the trustee in bankruptcy. But the rights and duties of the sheriff under the writ of fieri facias must be determined by the law as it stood independently of the Bankruptcy Act, except so far as they are altered or limited by that Act. Independently of the Bankruptcy Act, the law

(1) 2 T. R. 148.

not only gave him a power, but imposed upon him a duty to sell; and, unless that power and duty are taken away, or except so far as they are limited by the Act, he was justified by the writ in selling the goods, and the sale was legal. The first section of the Bankruptcy Act which was cited was s. 9. That section provides, that "on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy, shall have any remedy against the property or person of the debtor in respect of the debt." It is not necessary to determine whether the words of that section would prevent the completing of a remedy already begun as well as the taking of a new remedy. We must consider the other sections relied on for the plaintiff, which relate expressly to executions, viz., the 45th and 46th sections. The 45th section provides, that, "where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, &c." That section does not say that the sheriff is not to sell the goods, as it would be his duty to do under the execution, but only that the execution creditor is not to have the benefit of it, i.e., the benefit of the performance by the sheriff of his duty. That provision does not limit the power or duty of the sheriff to sell under the writ. Then s. 46 says, that "where the goods of a debtor are taken in execution, and, before the sale thereof, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge." The sheriff is only to deliver the goods on request, i.e., if requested to do so. If he is so requested, then his power under the writ is limited; his duty was to sell the goods, but by the request it is altered, and he is

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to deliver the goods to the receiver or trustee. But how does this provision alter or affect his power or duty, if no such request is made? I think that, if no request is made, his power and duty to sell remain unaltered and unaffected by the receiving order. He must proceed with the execution and sell the goods; but, when he has done so, the creditor is not to have the benefit, but the proceeds must be handed to the receiver or trustee less the expenses to which the sheriff is entitled. It follows that the sale in this case was not illegal.

With regard to the other point, for this purpose it must be taken that the sale was legal; but it is said that the defendant has incurred the penalty specified in the Sheriffs Act, because he has taken or demanded an improper amount for his charges. I am not prepared to say that the words of the 29th section of the Act are confined to demands made before the execution of the writ. I am disposed to think that there might be a wrongful demand within the section if a fraudulent or exorbitant demand was made after the execution of the writ, but it is unnecessary to decide that point; for I am prepared to agree with the decision of Cave, J., on the other grounds taken by him, viz., that this being a penal section is not to be construed favourably to the party seeking to enforce the penalty, and that the word "demand" cannot be applied to a mere claim which is made subject to taxation. That is quite enough for the purposes of this case. I think that the facts merely amount to this: the defendant said that he had a right to retain a certain amount out of the proceeds of the sale, and asked to retain it if the result shewed that he was entitled to retain such amount; but he offered his claim for taxation. He was thwarted at every step in his efforts to obtain taxation by the trustee. I am of opinion that he made his claim subject to taxation, and that under the circumstances there was no improper demand within the meaning of the section which imposes the penalty.

For these reasons I think that the appeal must be dismissed.

FRY, L.J. The first point made in this appeal by the trustee in bankruptcy is that the sale of these goods by the sheriff was

illegal. It was a sale of which it is hardly too much to say that it was made at the request of the official receiver. The question turns on the construction of ss. 9, 45, and 46 of the Bankruptcy Act, 1883. The 9th section is a general section as to receiving orders, and provides that, after the making of a receiving order, except as directed by the Act, no creditor, to whom the debtor is indebted in respect of any debt proveable in bankruptcy, shall have any remedy against the property or person of the debtor in respect of the debt. It does not seem to me necessary in the present case to inquire the exact meaning of the words "any remedy" in that section. It is enough to point out that in ss. 45 and 46 we have special enactments dealing with the case of a pending execution which give the official receiver or trustee of the bankrupt's estate certain rights. The rights of the estate are these. The official receiver or trustee may give notice of the receiving order to the sheriff, and may request him to deliver up the goods seized in execution. If he takes that course, the execution is put an end to, and the goods are to be delivered to the receiver or trustee, provision being made for the expenses of the sheriff. But suppose that no such request is made. The result appears to me to be that the sheriff must go on with the execution; but the creditor who has put the sheriff in motion is not to reap the fruits, or, to use the words of s. 45, "retain the benefit" of the execution. It was argued that these words mean that the execution is to be stopped, but they do not say anything of the sort. They merely say that the fruits of the execution are not to be retained by the creditor. In this case the official receiver did not exercise the power given him by the section. He chose not to demand the goods. It appears to me, therefore, that the sale by the sheriff was not illegal.

The second point turns on the Sheriffs Act. We have to consider whether in this case the defendant has "taken or demanded," within the meaning of the 29th section, money other than the fees allowed by the Act. What happened was this. The sheriff, as we hold, rightly sold the goods. The official receiver then asked for an account. An account was sent in by which the defendant claimed to deduct money to which he was not entitled. Is that under the circumstances a taking or

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demanding within the section? He originally received the money rightly in his character of sheriff's officer. The only taking or demanding of money that could be suggested against the defendant would be on the ground that he appropriated to the estate only the balance that remained after the deduction which he claimed to make, or, in other words, that he appropriated money in his hands in payment of his demands. But he appears to have been always willing that his claims should be taxed, and they were subject to taxation. He took proceedings to have them taxed which were frustrated by the action of the plaintiff. The only claim the defendant ever made was in acceding to the request of the receiver that he would render an account. He did render an account subject to taxation. To send in his account in contemplation that it would be taxed, and for the purpose of such taxation, does not seem to me to amount to demanding money within the section. It is only taking a step for the ascertainment of the amount which he is entitled to demand.

LOPES, L.J. The first contention for the plaintiff was that the sale of the goods by the defendant was illegal. Without going into the facts again in detail, it is sufficient for me to say that a writ was placed in the hands of the sheriff, which it was his duty to execute in the ordinary course by selling, unless anything should happen which in law ought to prevent his doing so. It was contended that under s. 9 of the Bankruptcy Act the writ was suspended directly the receiving order was made. I can find nothing in the section which supports this contention. Then we come to ss. 45 and 46. If they are carefully read, it will be obvious that they contemplate the continued existence of the writ of fi. fa., and give to the official receiver or trustee a right to request the sheriff to deliver the goods seized to him. In the absence of such a request, it seems to me that the sheriff was bound to go on with the execution of the writ. The second point arises under the Sheriffs Act. It is said that the defendant has, within the meaning of s. 29, taken or demanded money other than the fees to which he was entitled under the Act, and so has subjected himself to the penalty. I do not think that anything occurred which amounted to a demand within the section. The

official receiver applied to the sheriff for a statement of his charges. In answer, an account of his charges is sent in. The amount was no doubt excessive, but it is to be observed that the charges were made subject to taxation. In my opinion, the 29th section does not contemplate charges made subject to taxation, as these were.

Appeal dismissed.

Solicitors for plaintiff: *Bramall & White.*
Solicitor for defendant: *G. E. Lewis.*

E. L.

[IN THE COURT OF APPEAL.]

WILD *v.* WAYGOOD.

Employers' Liability Act—Negligence—Injury from Plaintiff's conforming to Order of Foreman—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 3.

The plaintiff was a workman in the employ of a firm of builders who were engaged in building a house. The defendants contracted with the builders to construct a lift in the house, and set D., one of their workmen, to do the work. D. applied to the builders' foreman to lend him a man to assist him, and the foreman selected the plaintiff for that purpose. There was evidence that the defendants agreed to pay the plaintiff's wages while he was so engaged. While the plaintiff was assisting D., D. told him to put a plank across the well of the lift and stand on it, and while he was standing on it D. negligently started the lift, and the plaintiff in consequence sustained injury:—

Held, first, that the plaintiff must be taken to have been a workman in the employment of the defendants and bound to obey the orders of D.; secondly, that the injury was a result of the plaintiff's conforming to the order of D., within the meaning of the Employers' Liability Act, 1880, s. 1, sub-s. 3, and that the defendants were liable.

Howard v. *Bennett* (58 L. J. (Q.B.) 129; 60 L. T. 152) considered.

APPEAL from the decision of a Divisional Court (Mathew and A. L. Smith, JJ.).

The action was brought by a workman for damages for injuries sustained in his work under the following circumstances:—

A builder named Horton was building a house, and the defendants contracted with him to construct a hydraulic lift on the premises. The plaintiff was in the employ of Horton, and Frost was Horton's foreman. One Duplea, a joiner in the employ of the defendants, asked Frost to allow one of his workmen

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to assist him in making the lift, to which Frost consented, and selected the plaintiff for that duty. There was evidence that the defendants agreed to pay the plaintiff's wages while he was so engaged. While the plaintiff was working at the lift with Duplea, Duplea directed him to put a plank across the lift, telling him that it was perfectly safe. While the plaintiff was on the plank Duplea pulled the string which started the lift, and the end of the plank went down; and the plaintiff to save himself from falling down the well of the lift, laid hold of a rope, which pulled him up to the pulley, and he thereby sustained serious injury.

At the trial before the county court judge at Manchester, the judge told the jury that they must find, first, whether the plaintiff was a workman of the defendants at the time when the accident happened; secondly, whether Duplea was the defendants' foreman under whose directions the plaintiff was working. The jury found in the affirmative on both these questions, and gave a verdict for the plaintiff with 50*l.* damages. The Divisional Court held that it was not shewn that Duplea was empowered to give directions which the plaintiff was bound to obey, or that the plaintiff's injury was caused by his conforming to any direction of Duplea's; and they considered that the case was covered by *Howard* v. *Bennett*. (1) They accordingly gave judgment for the defendants, but they granted leave to appeal. The plaintiff appealed from this decision.

Parfitt, for the plaintiff. The evidence was sufficient to prove that the plaintiff was employed by the defendants, and that he was under the orders of Duplea. The only difficulty arises on the question whether the injury to the plaintiff arose from his conforming to the orders of Duplea, so as to bring the case within the meaning of the 3rd sub-section of s. 1 of the Employers' Liability Act, 1880. (2) The learned judges of the Divisional

(1) 58 L. J. (Q.B.) 129; 60 L. T. 152.

(2) 43 & 44 Vict. c. 42, s. 1: "Where after the commencement of this Act personal injury is caused to a workman . . . (3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed;

Court were of opinion that the injury did not result from the plaintiff conforming to the orders of Duplea, and that the case did not come within the sub-section. But it is not necessary to shew that the conformity with the order was the direct cause of the injury; the cause of action is the negligence of the foreman or person giving the order, and it is sufficient to satisfy the statute if that negligence is accompanied by conformity to one of his orders on the part of the injured workman. In the present case the conformity of the plaintiff to the order, and the careless act of the foreman in pulling the cord, were closely connected; they were both engaged in the same piece of work: *Millward* v. *Midland Ry. Co.* (1); *Wright* v. *Wallis.* (2)

Tatlock, for the defendants. The plaintiff was not employed by the defendants, nor was Duplea set in authority over him; he was a simple workman, himself employed in manual labour, and the plaintiff was only sent to help him. With respect to the point which has been principally argued, the defendants contend that the conformity to the directions of Duplea was not the cause of the injury, but the act of Duplea in pulling the cord. In order to bring the case within the 3rd sub-section there must be negligence in giving the order, and the conformity to the order must be the cause of the injury. Here there was no negligence in telling the plaintiff to go on the plank; the negligence, if any, was in pulling the cord at the wrong time; but that was done by Duplea as a fellow-workman, not as a foreman, and had nothing to do with any order which he had previously given. It could never have been intended that the sub-section should apply to any act of carelessness of a foreman at any time after he had given an order to the workman who is injured, even though the accident had nothing to do with the order: *Howard* v. *Bennett* (3); *Kellard* v. *Rooke* (4); *Snowden* v. *Baynes.* (5)

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the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same rights of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

(1) 14 Q. B. D. 68.

(2) 3 Times Rep. 779.

(3) 58 L. J. (Q.B.) 129; 60 L. T. 152.

(4) 19 Q. B. D. 585; 21 Q. B. D. 367.

(5) 25 Q. B. D. 193.

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LORD HERSCHELL. This is an action under the Employers' Liability Act, 1880, to recover damages for personal injury. At the trial the plaintiff obtained a verdict, after certain objections had been taken on behalf of the defendants, and the question is whether it can be said that there was no case to go to the jury, on the true construction of the Act, in support of the plaintiff's claim. The plaintiff was in the employ of a person named Horton, who was building some premises in which a lift was to be constructed. The defendants were constructing that lift, and for the purpose of completing its construction or testing it—at all events, with a view of leaving it in proper order—a man named Duplea, in the employ of the defendants, was on the premises of Horton. He was the only person on those premises engaged on that work. Duplea, it appears, applied to the foreman of Horton to let him have one of Horton's workmen to do certain work in connection with the lift, and Wild, the plaintiff, was told off for that purpose. On the day on which the accident happened, which was three days after the first day on which the plaintiff acted in connection with Duplea—I will say for the moment in connection with Duplea, but I will deal with the relation in which they stood to each other presently—he had been ordered by Duplea to put a plank across the well of the lift, and we may infer that he was also told to stand upon that plank. It matters not what the exact purpose was that Duplea had in view, whether it was to test the lift or to see whether it was properly completed, it was an operation in connection with the work that Duplea was doing, and it must be taken that there was evidence that Duplea, whilst the plaintiff was on that plank, negligently started the lift, the effect of which was that the plaintiff was in the position of having to choose between two alternatives—either to fall down the well of the lift, or to endeavour to catch hold of the rope, which he did, and which carried him up to the pulley and injured him considerably. Therefore, this is certain: that he was injured owing to his stepping on the plank, and the lift while he was so standing upon it being started. That the position which he was ordered to occupy was one of danger if the lift was started while he was upon it, is certain. Under these circumstances, the action was brought, and

several points were taken on behalf of the defendants to shew that there was no liability, the plaintiff insisting that the liability arose by reason of the language of the 3rd sub-section of the 1st section of the Act. The first objection taken is, that the plaintiff was not in the service of the defendant—that he was not a workman within the meaning of the Act—and reliance is placed upon the definition of "workman" in the 8th section of the Act. That is defined by reference to the Employer's and Workman's Act, 1875. That the plaintiff was a workman within the general description of "workman" there defined is not disputed, but it is said he must be a workman who has entered into or works under a contract with his employer. It is said the plaintiff was not working under any contract with the defendants, and therefore was not a workman within the meaning of the Act, and capable of suing under it. The only effect of that objection if it prevailed would be this, that there would be no question as to the defendants' liability, but the action should have been one brought at common law, and not brought under the Employers' Liability Act. But I think that in this case there is evidence that the plaintiff was a workman employed by the defendants. Duplea had requested Horton's foreman that he should have furnished to him a man for the purpose of doing the work in connection with the lift. It was not work which Horton had to do, but work which the defendants had to do. There is evidence that Duplea needed and obtained assistance for the work he had to do, and his employers recognised it as being rendered on their behalf, and asked to have an account sent in for the work the man had done, so that they might pay his wages during the time he was so engaged. It is enough to say that there was evidence which it was impossible to withdraw from the jury that the plaintiff was in the service of the defendants within the meaning of this Act. Then it is said that Duplea was not a person to whose orders the plaintiff was bound to conform. No doubt that is an essential element in order to establish liability under the 3rd sub-section. This Court has no power to review facts, nor had the Court below; it has only power to determine questions of law. If there was evidence that he was a person to whose orders the plaintiff was bound to conform, the judgment

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must stand. Now the fact was this, and it does not appear to be immaterial, that Duplea was the only person in the service of the defendants who was on the premises. He was there in connection with the arrangement and construction of this lift, which was a matter in which no doubt he had had, while in their employ, ample experience, otherwise the defendants would not have sent him alone to do this work. He himself says that he was the person to give orders, and the only person to give orders, and that he did give the plaintiff orders, and that the plaintiff did what he was told to do by him. To those answers given in cross-examination there was no re-examination. Having, therefore, Duplea there as the only person who could give any orders if any were to be given, he being the person to do this work and see that it was done, and that the plaintiff was engaged to do work in conjunction with or assisting Duplea, and having regard to the evidence which I have just referred to, I do not think it possible to say otherwise than that there was here evidence (and that is all that is required) that Duplea was a person to whose orders the plaintiff was bound to conform. I do not think that the judgment which was given in favour of the defendants in the Court below turned at all upon either of those points.

But then comes the third, undoubtedly a much more serious point, and it is upon that the judgment of the Court below turned. In order to establish liability it must be shewn that the injury resulted from or was caused by reason of the negligence of a person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, and that the injury resulted from his having so conformed. Now, here there was undoubtedly evidence of negligence. No objection was taken that there was no evidence to go to the jury on that point, and we must therefore treat this as a case where negligence must be assumed. But then it is said that although the injury to the plaintiff may have arisen by reason of the negligence of Duplea, and although the plaintiff may have been bound to conform to the orders of Duplea, yet that the injury did not result from his having so conformed. In the present case there was obviously a most intimate connection between the conformity with the order,

the negligence, and the injury, because the negligence was in starting the lift whilst the plaintiff was in the position which he had been ordered by Duplea to take up. If the plaintiff had not been on the plank there would have been no negligence in Duplea starting the lift; the negligence was in starting the lift while the man was upon the plank, and the man was on the plank in conformity with an order which he was bound to obey. Therefore, it appears to me, as I have already said, that there was the most intimate connection between the two. But then it is said that the conformity to the order of Duplea was not the causa causans of the injury—that the causa causans was the starting of the lift. I do not think, on the true construction of this sub-section, that it is necessary that conformity to the order should be the causa causans of the injury, because the provision is that the action may be brought where personal injury is caused by reason of the negligence. The negligence must be the causa causans of the injury, no doubt. That is what gives the right of action, and if the section had stopped there that is all that would have to be proved, viz., negligence, which was the causa causans of the injury to the person who suffered. But then the section does not stop there, and undoubtedly something more must be proved. It is not enough to prove that there was negligence in a servant of the defendant which caused the injury, nor that that negligence was the negligence of the person to whose orders the plaintiff was bound to conform; but it must be proved that the injury arose, not alone from the negligence of such a person, but also from his having conformed to the order. Now, in this case it appears to me, and I do not propose to lay down any general rule upon the subject, that it is quite clear the injury did result from the plaintiff having conformed to an order when he was told to go to a place which was, and must have been known to be, a dangerous place if the person who told him to go there was guilty of negligence. That person having been guilty of negligence created the danger and caused the injury, it seems to me the case is within the very terms of the Act. It is not necessary to endeavour in the present case to determine or lay down any general rule as to the construction of this section beyond this, that I am quite clear it is not limited to an injury

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arising from an order which order is negligent in itself. That is one contention put before us. I think the words used in the Act of Parliament are conclusive against any such construction. It would be limiting it far beyond what the words either require or will admit of. That is all I lay down as regards the construction of the section, beyond this: that I do not think it essential to shew that the conformity to the order was what has been called the causa causans of the injury. The negligence must be proved, and if you prove the negligence, then it is sufficient if, in addition to proving that, you also prove that the injury resulted, not from the negligence alone, but from the negligence and the conforming to the order.

I have dealt with the question, apart from authority, on principle and the true construction of the statute. But it appears to me the view which I have enunciated in the present case has been taken in other cases. In *Millward* v. *Midland Ry. Co.* (1), the only question was whether there was evidence to go to the jury; but if the contention of the respondents be correct, it would follow that there was no evidence to go to the jury in that case. In *Millward* v. *Midland Ry. Co.* (1), Mathew, J., said: "I think there was evidence that the injury resulted by reason of the plaintiff conforming to the order given by him to Hicks to assist in the operation that was being performed, and in the performance of which Hicks was guilty of negligence;" although from the order and conforming to the order in that case there would have been no injury except for the subsequent negligence of the person who gave the order. Then in *Wright* v. *Wallis* (2), I think Lord Esher took the same view which I have presented in this case, although it can only be treated as a dictum, and I think that both A. L. Smith, J., and Lord Esher again appear to have entertained the same view of the law by the observations which they made in the case of *Kellard* v. *Rooke*. (3) The case which has naturally been much relied upon by the learned counsel for the respondents, is the case of *Howard* v. *Bennett* (4), and it was upon the authority of *Howard* v. *Bennett* (4) that this case was decided by the learned judges in the Court below. I think it is

(1) 14 Q. B. D. 68.
(2) 8 Times Rep. 779.
(3) 19 Q. B. D. 585; 21 Q. B. D. 367.
(4) 58 L. J. (Q.B.) 129; 60 L. T. 152.

clear on reading their judgment, that although they did not criticise that judgment, they followed it rather than indicated concurrence with it. Now, in *Howard* v. *Bennett* (1), the facts are more fully reported in the *Law Times* than in the *Law Journal*. In the report in the *Law Journal*, there is no mention of any evidence to shew that the person whose negligence caused the injury was the person to whose orders the injured person was bound to conform, and there is no reference to that in the judgment in terms. But there does appear to have been, according to the statement of facts in the *Law Times*, some evidence of that sort. Notwithstanding that, the first ground taken by the Lord Chief Justice, in determining the case for the defendant in that action, is that there was no order given by a person to whose orders the plaintiff was bound to conform. That, so far as I can make out, seems to have been the only ground taken by Manisty, J., and of course, so far as that ground is concerned, it need not be considered in the present case, because it is not material to the point I am now dealing with. But undoubtedly Lord Coleridge does say this: "In the second place, even assuming that there was,"—that is to say, that there was a person to whose orders the workman was bound to conform—"the injury never in reality resulted from it." In that case there were two men working a machine, and it was the duty of one to start it, and the other to do certain operations in connection with it. If there was an order given which the man was bound to conform to at all, it was an order to put certain calico on to the machine, and that order being complied with and conformed to, the other person started the machine, and so the plaintiff was injured. It is necessary to state that in order to explain the judgment of the Chief Justice. He says, "The injury resulted, not from the directions given"—"order" it should be—"but from the machine being set off too soon and at too great a speed." Now, I most respectfully express my dissent from the view of the Lord Chief Justice there indicated. Of course, it may be that the person who started the machine was not a person to whose orders the plaintiff was bound to conform; but, supposing the plaintiff was bound to conform, and that the person to whose orders he was

(1) 58 L. J. (Q.B.) 129; 60 L. T. 152.

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bound to conform in working a machine tells him to put his hand in a certain part of the machine and then negligently starts it while the man's hand is there, I own I cannot agree that in that case the injury which is caused by the negligent starting of the machine in such circumstances is not an injury which results from conforming to the order given. The order given was to put his hand in a certain part of the machine, which is a part where his hand will be in immediate danger if the machine is started; and his hand being there, the negligence consists in starting the machine whilst his hand is there. Under such circumstances as those, there seems to me the most immediate and intimate connection that one can conceive between the negligence which caused the injury and the conforming to the order, because it is in truth one element of the negligence that he was conforming to the order at the time. Therefore, with great respect to the learned Chief Justice, I am unable to concur in the view that the conformity with the order must be in that sense the causa causans of the injury. Under these circumstances I think this appeal must be allowed. If one looks at the whole current of judicial views, I think they are in favour of the view which we entertain in the present case; and, after all, what we have to do, unless there is any authority which binds us, is to construe the statute, and I entertain no doubt that the present case falls within it. The judgment of the Divisional Court will, therefore, be reversed.

LINDLEY, L.J. I am of the same opinion, and I will add but very few observations to those which have been made by Lord Herschell, and I wish to confine them to those points on which we differ from the Divisional Court. This case comes before us on appeal by leave, and the only point on which the Divisional Court had a difficulty is one which I will revert to presently. There was no difficulty, as I understand, in the minds of the judges of the Divisional Court on the ground that there was evidence to go to the jury on the question whether the plaintiff was a workman, nor on the question whether he was in the employ of the defendant, nor on the question whether Duplea was a person to whose orders he had to conform. I quite

concur in the view the Divisional Court took of these questions. Then comes the question of difficulty, a difficulty occasioned not by the decision of *Howard* v. *Bennett* (1), but by the last part of the Lord Chief Justice's judgment in that case. That difficulty turns on the true construction of s. 1, sub-s. 3, of the Employers' Liability Act, 1880. I will not read that section again, because it has been read several times, but, upon examining that section, it appears to me that five things must be proved. First, injury to the plaintiff; secondly, negligence of some person in the service of the defendant; thirdly, that the person was one to whose orders the plaintiff was bound to conform; fourthly, that the plaintiff did conform to those orders; fifthly, that the injury resulted in his conforming thereto. The difficulty in construing the sub-section arises from the last portion of the section—that is to say, the injury resulting from his conforming to the order. In reading that section, one is apt to lose sight of (and I think Mr. Tatlock's argument is open to that remark) what the cause of action is. It is an action for negligence causing injury to the plaintiff. That must be proved, but something more must be proved, and when you come to examine the section you must prove this much more: that the negligence was that of a person in the employ of the defendant to whose orders the plaintiff was bound to conform; and, secondly, that the injury to the plaintiff resulted from his having conformed to those orders. The whole I think comes to this: that the injury must be the result of negligence of the person giving those orders and of the plaintiff conforming to those orders. It will not do to prove one of these things only; the injury must be the result of the two, and if the two are so connected together as to cause the injury, then it appears to me that the case comes within this section. Now, on the facts which have been so thoroughly gone through by Lord Herschell, it is impossible not to say that this case does fall within that section. What was it that produced the injury to the plaintiff? It was the joint effect of the plaintiff being on the plank and the carelessness of Duplea in pulling the string. Those two things are so connected that it is

(1) 58 L. J. (Q.B.) 129; 60 L. T. 152.

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impossible to say that the injury was not caused by those two things, viz., negligence of the person giving the order, and conformity with the order. Under this state of things I think the section plainly applies, and I cannot help thinking that the Divisional Court would have had no difficulty if it had not been for the last part of Lord Coleridge's judgment in *Howard* v. *Bennett*. (1) The decision of that case seems to be right enough, but that which is contained in the last part of Lord Coleridge's judgment I must say I cannot agree to.

KAY, L.J. In this case I agree with Lord Herschell and Lindley, L.J., that we must treat the plaintiff as a workman within the meaning of the 1st section of the Employers' Liability Act; and I also agree that he was, or at least that there was evidence to go to the jury that he was, bound to conform to the order of Duplea, who was in the employ of the defendants. It is quite plain that at the time the accident happened which caused the injury, the plaintiff was in fact conforming to the order of Duplea, who had directed him to place a plank across the lift and to stand on that plank. The only part of the case on which I wish to add a few words is the very important question of the construction of the clause of the Act upon which there has been so much argument. Now, the first section of the Act begins with these words, which govern every one of the sub-sections: "Where personal injury is caused to a workman by reason of." Then the sub-sections begin, "By reason of." So that if you read the 3rd sub-section you must read it with those words, "Where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer to whose orders or directions" he was bound to conform. The section refers to different causes of injury: one is defect in the condition of the ways; another is negligence of any person in the service of the employer who has superintendence entrusted to him, an expression which is defined by s. 8 of the Act; in all those cases the employer is liable. It is treated there as though the injury was caused by the negligence of the employer himself. Then comes the 3rd sub-section, which

(1) 58 L. J. (Q.B.) 129; 60 L. T. 152.

is restrictive. The 3rd sub-section refers to an accident caused to a workman by reason of the negligence of a person who is not a person who has any superintendence, but is a person to whose orders the workman at the time of the injury was bound to conform, and did conform; and then it goes on to say that the injury must result from such conformity. Therefore, the injury must be caused by the negligence of that person, and must result from the workman at the time of the injury conforming to his order. Now, it seems to me that there are three possible constructions to be put on that section. The first point that has been argued before us is that it only means an injury from conforming to a negligent order—the negligence being in the order itself. The second is that it means anything that may occur while conforming to an order; and the third is that it means only such direct or indirect results as are closely connected with the order that has been given. I think the first construction argued for is inadmissible. The section clearly shews, that it is not confined to an injury caused by a negligent order, but that it must be caused by the negligence of the person giving the order, and must result from conforming to the order given. I do not think that it would be the proper construction of that sub-section; I think it would be much too narrow to say that it refers merely to negligence in giving the order. Then I think the second construction would also be much too wide. To say that it includes every case of negligence after an order has been given which the workman was bound to conform to at the time, would make it extend to a case where the order was a general order to assist the person who gave it in certain work, and which might be given days or weeks before, and the accident might result from the negligent act of that person while the workman was assisting him. I am not prepared at present to say that the construction of the sub-section is so wide as that. It seems to me the third construction is the most reasonable construction of the section—that it relates to negligence which has an intimate connection with the conforming of the workman to an order given him at the time of the injury and to which he was conforming at the time of the injury. It seems to me that this case certainly comes within the 3rd sub-section if that is the

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meaning which is to be given to it. At the time that this injury occurred, and at the time that the negligent act of Duplea took place, the workman who was under his orders, and who was conforming to his orders, was standing in a dangerous position on a plank across the well of the lift. The negligent act was pulling the string of the machine, which started the lift at the moment the workman was standing on the plank. The negligence was really a combination of those two things. If the workman had not been on the plank, there would have been no negligence in pulling the string. It was because the workman was there at the moment, conforming to the order given to him by Duplea, that the pulling of the string by Duplea was an act of negligence. Therefore, the injury may be said to have resulted from conforming to the order, the act being done by Duplea whilst the workman was conforming to his order. That seems to me to be directly and exactly within the meaning of the sub-section, unless you are to confine the sub-section to the single case of negligence in giving the order. For the reasons I have given I do not think that is the true construction of the sub-section. Although I refrain from attempting to give any general definition that might govern other cases, I am clearly of opinion that this case does come within the true meaning and intent of the 3rd sub-section, and that it is one of the very cases which it was intended to meet. I therefore think the employers are liable in this case, and that the judgment of the Court below must be reversed.

Appeal allowed.

Solicitors: *Smiles & Co., for Gabb, Droitwich*; *Watson, Sons, & Room, for Shakespeare, Birmingham.*

M. W.

[IN THE COURT OF APPEAL.]

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March 8.

ALEXANDER *v.* JENKINS AND ANOTHER.

Defamation—Slander—Imputation of Drunkenness—Unfitness for office of Town Councillor—Honorary Office.

Words spoken of a man who has been elected to the office of town councillor of a borough, alleging that he is an habitual drunkard and unfit for the office of town councillor, are not actionable, in the absence of special damage.

Onslow v. *Horne* (2 W. Bl. 750) followed.

In an action for slander of the plaintiff, who had been elected to the office of town councillor for a borough, it appeared that the words spoken were: "A. (the plaintiff) is never sober, and is not a fit man for the council. On the night of the election he was so drunk that he had to be carried home." No special damage was proved:—

Held, that, inasmuch as the office of town councillor was not one of profit, and the charges affecting the plaintiff such as, if true, afforded no ground for dismissing him from his office, the action was not maintainable.

APPEAL from a judgment of Grantham, J., at a trial with a common jury in Middlesex.

The action was brought to recover damages from the defendants Jenkins and Young, for slanderous words spoken of the plaintiff in relation to his office as a member of the town council of Salisbury, and in relation to his fitness for discharging the duties thereof.

The plaintiff was elected a town councillor at a bye election in 1890. The words complained of were spoken by the defendants soon after the election, but before the plaintiff had made the statutory declaration under the Municipal Corporation Acts, or entered upon the duties of his office. The words spoken by the defendant Jenkins were as follows: "Alexander (the plaintiff) is never sober, and is not a fit man for the council. On the night of the election he was so drunk that he had to be carried home." Jenkins and the other defendant, Young, also spoke words to the same effect a day or two afterwards.

The jury found a verdict for the plaintiff against both the defendants, with damages; and the learned judge gave judgment accordingly, being of opinion that the words were actionable. The defendants appealed.

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McCall, Q.C., and *Macaskie*, for the defendants. The words spoken were merely words of abuse, and were not meant to be taken strictly. But if they were meant to be so taken, they were not actionable, no special damage being proved. They were not spoken of the plaintiff in respect of his conduct as a town councillor; they did not impute to him any misconduct in the execution of his duties, for he had not then entered upon his office. And if he had entered upon his office, there is no authority for saying that the words would have been actionable. It would have been different if the office had been one of profit; but a distinction has always been taken between such offices and those which are offices of credit and honour only. Moreover, the words spoken did not attribute to the plaintiff conduct which could have led to his dismissal from his office. Drunkenness is no doubt a disgrace to a man, but it would not unfit him for discharging the duties of town councillor, or disqualify him from holding the office: Municipal Corporation Act, 1882 (45 & 46 Vict. c. 50), ss. 9, 10, 36; *Lumby* v. *Allday* (1); *Miller* v. *David* (2); *Ayre* v. *Craven* (3); *Onslow* v. *Horne* (4); *Dod* v. *Robinson* (5); *Gallwey* v. *Marshall* (6); *Hopwood* v. *Thorn* (7); *Doyley* v. *Roberts* (8); *How* v. *Prinn* (9); *Bill* v. *Neal* (10); Starkie on Slander and Libel, p. 148.

Channell, Q.C., and *E. Norton*, for the plaintiff.

[LORD HERSCHELL. The only point on which the Court wish to hear you is whether there is any authority for holding that an action can be maintained for an imputation on a man who holds an office, not of profit, but what has been called an office of credit and honour, when the conduct imputed to him would not have led to his being deprived of the office.]

It may be true that the plaintiff could not have been dismissed from his office for drunkenness; but the office was not held for life, but for a short period only, and the imputation, if true, would probably have prevented his re-election, which would be equi-

(1) 1 C. & J. 301.
(2) Law Rep. 9 C. P. 118.
(3) 2 A. & E. 2.
(4) 2 W. Bl. 750.
(5) Aleyn, 63.
(6) 9 Ex. 294.
(7) 8 C. B. 293.
(8) 3 Bing. N. C. 835.
(9) 2 Salk. 694; Holt, 652; S. C. 1 Bro. P. C. 64.
(10) Lev. 52.

valent to dismissal. It is remarkable that nearly all the cases on the subject are old, and old cases are not a safe guide on such a question. Imputations which would have been thought lightly of in old times would now bring disgrace on a man and exclude him from offices of credit. The real reason why words spoken of a person holding an office of profit are in themselves actionable is that the law implies damage without actual proof; and if the imputation against a person in an office of credit is such as would, if believed, bring him into disgrace and contempt, why should not the law imply damage in that case also?

[KAY, L.J., referred to *Birchley's Case.* (1)]

Pecuniary loss is not the only kind of damage. Disgrace and loss of character are sufficient to support the action. Persons holding public offices are in a special position with respect to imputations on their character and ought to be protected by the Court: 1 Rolles' Abr. 70, 71; *Highmore* v. *Earl of Harrington* (2); Odgers on Slander, p. 65.

M'Call, Q.C., in reply.

LORD HERSCHELL. This action raises a question of some novelty, and not without importance. The action was brought by the plaintiff, who had been elected town councillor, and is an action of slander, in which the defendants are charged with having said that the plaintiff was "never sober, and not a fit man for the council." The verdict passed for the plaintiff, and the jury must be taken to have found that those words were in fact used. But the defendants appeal against the judgment which was entered for the plaintiff, on the ground that, assuming these words to have been used, under the circumstances in which they are alleged to have been used, an action of slander will not lie. Now, I think it must be taken that those words are not mere words of abuse, but that they do impute to the plaintiff, who had been elected a town councillor, that he was an habitual drunkard, and that, as an habitual drunkard, he was not a fit man to discharge the duties of a town councillor. The question is whether, in respect of such an imputation, an action will lie. The

(1) 4 Rep. 16. (2) 3 C. B. (N.S.) 142.

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charge is not one made against him of any misconduct in his office, or any acts done by him as an officer which he ought not to have done; but it is simply a charge of unfitness to hold the office to which he had been elected, on account of moral misconduct. Now, I think that no one can examine the authorities upon the law of slander without seeing that there are a number of distinctions to be found which cannot be supported on any satisfactory principle. Obviously, the idea lying at the root of the distinction between slander and libel was this, that it never would do to permit actions to be brought in respect of every word spoken which might reflect on the character or conduct of another. But, on the other hand, it was considered necessary to put some qualification on this, by enabling an action to be brought where the charges were of a certain gravity, and likely to be pecuniarily injurious, and in certain cases injurious in another fashion, to which I will allude presently. Of course, where special damage can be shewn, the action will lie. We are now only dealing with a case which assumes that the plaintiff cannot shew, or has not shewn, any special damage. But in all these cases in which the action has been held maintainable, the nature of the rules laid down is itself a certain check against an indiscriminate use of the law of slander. Now, I may put aside the actions which are brought in respect of an imputation that a man has been guilty of a crime, and I will only deal with those which impute to him misconduct in relation to some office or employment. It is quite clear that as regards a man's business, or profession, or office, if it be an office of profit, the mere imputation of want of ability to discharge the duties of that office is sufficient to support an action. It is not necessary that there should be imputation of immoral or disgraceful conduct. As was said in *Lumby* v. *Allday* (1) by Bayley, B.: "Every authority which I have been able to find either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." It must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would shew that he is a man

(1) 1 C. & J. 301.

who, by reason of his want of ability or honesty, is unfit to hold the office. So much with regard to offices of profit; the reason being that in all those cases the Court will presume, or perhaps I should rather say the law presumes, such a probability of pecuniary loss from such imputation, in that office, or employment, or profession, that it will not require special damage to be shewn. It may be said to be an arbitrary rule. Be it so; but the rule is, at all events, laid down, and seems to me to rest on that basis. But when you come to offices that are not offices of profit, the loss of which, therefore, would not involve necessarily a pecuniary loss, the law has been differently laid down, and it is quite clear that the mere imputation of want of ability or capacity, which would be actionable if made in the case of a person holding an office of profit, is not actionable in the case of a person holding an office which has been called an office of credit or an office of honour. In his work on the law of libel, Mr. Starkie points out that the distinction which has been drawn is not by any means satisfactory. I think nobody can read the cases without feeling this to be so. The ground upon which Holt, C.J., put it is, that a man cannot make himself wiser or more able than he is —he cannot add to his ability—but he may make himself a better man. (1) That is not a very satisfactory foundation on which to rest a legal distinction; but, however it may be, there it is, and I feel very strongly in this case what was said by Pollock, C.B., in delivering the judgment of the Court in the case of *Gallwey* v. *Marshall* (2), that we ought not to extend the limits of actions of this nature beyond those laid down by our predecessors. When you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle; but where we are dealing with such an artificial law as this law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the legislature that must make the extension and not the Court. Now, it having been held that there is a distinction between that which is actionable, in the case of offices of honour or credit

(1) *How* v. *Prinn*, 2 Salk. 694; Holt, 652. (2) 9 Ex. 294.

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as compared with the case of an office of profit, the ground upon which the action has been said to be maintainable in the former case, certainly in some of the authorities, would seem to be this, that the language used has been such as, if true, would shew that the man ought to be deprived of his office, and therefore involves a risk of exclusion from that office. No case, I think, has been cited to the Court which cannot be supported on that ground. In the case of an imputation on a justice of the peace, there was certainly a risk of deprivation. The language used, if true, would have justified deprivation, and shewn that it was proper and perhaps necessary. So in the case of an action by a churchwarden, where there was an imputation on him of misconduct in his office, he too might have been deprived. But, as I have said, it is not necessary to go so far to-day as to deal with the case of an imputation on a man of misconduct in his office. All we have to deal with is merely an imputation of unfitness for the office—and there is no case in which an action of slander has been held to lie for an imputation that a man by reason of his conduct is unfit for an office, except where, by reason of that misconduct, if it existed, he could have been deprived of the office. In Mr. Starkie's work, this liability—this danger of exclusion from office—is said to be that which gives rise to the action; and, at all events, there is there an intelligible ground upon which these actions may be rested, even if it be not altogether a satisfactory one. But we are asked to-day to make an extension, and to say that an action will lie where a person is charged with being unfit for his office, although he could not—however true the charge—be excluded for that reason from the office. That would be a step in advance, and I do not think it is a step in advance which we are justified in taking. It is on that ground exclusively that I desire to rest my judgment; I will put it shortly thus: that where the imputation is an imputation not of misconduct in an office, but of unfitness for an office, and the office for which the person is said to be unfit is not an office of profit, but one merely of what has been called honour or credit, the action will not lie, unless the conduct charged be such as would enable him to be removed from or deprived of that office. It follows that in the present case the action is not maintainable.

But certainly the whole of these proceedings have been induced by misconduct, by what has been found to be misconduct, on the part of the defendants; and, therefore, I think that we should now deal with this action as it should have been dealt with at the trial, if that view of the law had been taken, and say that although there must be judgment for the defendants in the action, it must be judgment without costs. As to the costs of this appeal, I should not be indisposed to deprive the appellants of them; but, upon the whole, as they have succeeded, and have been proved right in point of law, and as it was necessary to come here to set the judgment right, I think the appellants must have the costs of the appeal.

LINDLEY, L.J. I am of the same opinion. It is not open to us to remodel the law of slander, and I do not think that it is desirable that we should extend the limits within which actions will lie for words which are merely spoken. We are not dealing with libel; we are dealing with mere slander. Not mere abuse; the defendants have gone beyond the limits of mere abuse. They have deliberately charged the plaintiff with intemperance, such habits of drunkenness as unfit him to be a town councillor. That is the slander complained of, and that is the slander proved. Now the cases, when looked at, are not based on very logical principles, but they are based upon working rules which are intelligible enough, and are to a certain extent reasonable enough. What the plaintiff complains of here is a slander which is to the effect that, by reason of his drunkenness, he is unfit for the office which he aspires to fill, and to which he has been elected. He is not charged with any malversation in his office; we have not to consider that. He is charged simply with being so often drunk as not to be fit to be a town councillor. Now, the first thing, to my mind, which we have to find out is this: whether he can be removed from the office of councillor because he is often drunk. I can find nothing in the statutes relating to borough councillors which enables anybody to be removed by reason of drunkenness. That being so, we have to face decisions which shew that when a person is merely accused of unfitness for an office of honour (not of profit,

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with which we are not dealing), that unfitness must be one which would expose him to the risk of removal from the office which he fills, or seeks to fill. That this is the law was settled at least as early as *Onslow* v. *Horne* (1), when De Grey, C.J., reviewed some previous decisions, and I can find no doubt thrown on that doctrine in any case which has been decided since. It has been recognised more or less in subsequent cases, and neither in *Gallwey* v. *Marshall* (2) nor in *Lumby* v. *Allday* (3) do we find that that principle has been doubted. I do not know that it was expressly sanctioned in the last-mentioned case, but I think it was in *Gallwey* v. *Marshall.* (2) That is an intelligible rule, although it is open to the objection that it is not very logical, and that it ought not to be extended. But, I take it, that is settled, and being settled, it disposes of this case. I think the learned judge ought not to have left this case to the jury. He ought to have said that there was no case for the jury; that the action was not sustainable. If he had done that, I do not suppose he would have given the defendants any costs. The defendants did not win on any merits of their own; at all events, I should not have given them their costs. The appeal is a different matter. They are driven to the Court of Appeal in order to get free from the judgment which exists. Therefore, I think the appeal must be allowed. There must be judgment for the defendants in the action without costs, and the appellants must have the costs of the appeal.

KAY, L.J. I concur in this decision, and desire to express my concurrence in very few words. This is a case of slander. Beyond all question the words used were defamatory words. I have no doubt of their meaning. They imputed to this plaintiff that he was an habitual drunkard, and that by reason of that habit he was unfit for the office to which he had just been elected of a town councillor. Now, the reason for my concurrence is this. There is no proof of any special damage, and the question is whether this is one of those cases in which the Court will dispense with that proof, and will infer or presume

(1) 2 W. Bl. 750.

(2) 9 Ex. 294.

(3) 1 C. & J. 301.

that there was damage. The office to which he had been elected was not an office of profit. It was an office which has been called in some of the cases an office of credit, an office which it was an honour to hold, but not one which brought any direct pecuniary advantage. The habit which was imputed to him by the slander, even if it had been proved, would not have enabled any one to deprive him of that office. There at once arises the difficulty: will the Court in a case of that kind presume in the absence of proof that such a slander would occasion damage? I agree that it is not in every case necessary to prove pecuniary damage. One has only to remember that the imputation of a criminal offence to a man is actionable without any proof of damages, and there are other instances where it is quite plain that it is not necessary that pecuniary damage should be shewn. I have no doubt it may be said that in a case of this kind such imputation, if believed, would be likely to render him an object of contempt to his fellow town councillors, and to induce them rather to avoid him; but, nevertheless, no case yet has been cited to us, and I can find none, which has gone so far as to say that under circumstances such as I have stated the Court will assume, or ought to assume, that damage will be suffered without any proof of it. Now, I must make a distinction, and I desire entirely to reserve my opinion in such cases as I am about to mention. If this had been an imputation of a disgraceful act done in his office, although it might be an act not sufficient to deprive him of that office, it may possibly be that an imputation of that kind would be a sufficient slander to be actionable without proof of damage. And, again, I desire to reserve my opinion on this further point: if this imputation had been made while he was a candidate for the office, and might possibly have prevented his candidature from succeeding, it seems to me a very strong argument might have arisen for holding the words actionable, although there was no proof of actual damage. I express my opinion only on the facts of this case, and it seems to me that, although the words, if untrue, were perfectly unjustifiable, seeing that the plaintiff cannot prove that he has suffered any special damage from them, it is not, for the reasons I have given, a case in which the Court will assume in his favour that

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there would be damage; and, therefore, I think that the action is not maintainable.

Appeal allowed.

Solicitors for plaintiff: *Long & Gardiner, for A. Whitehead, Salisbury.*

Solicitors for defendants: *Taylor, Hoare, & Box, for Nadder & Tatham, Salisbury.*

M. W.

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Jan. 13, 14.

WOOLLEY AND OTHERS *v.* BROAD.

Copyright—Design—Registered Proprietor—Licence to sell—Infringement of Copyright—Right to sue—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 58, 59.

The registered proprietor of a design applicable to lace goods (registered under the Patents, Designs, and Trade Marks Act, 1883) verbally agreed with the plaintiffs to supply to them all the goods manufactured by him according to the design, and to give them the exclusive right of selling such goods. On demurrer to a claim by the plaintiffs to recover damages against a third person for applying the design to lace goods, and selling goods to which it had been applied, without the licence or written consent of the registered proprietor or of the plaintiffs:—

Held, that the statement of claim disclosed no cause of action, because the plaintiffs were not the registered proprietors of the design, and the only right of action in respect of the injuries complained of was that given by s. 59 of the Act to the registered proprietor exclusively.

ARGUMENT of a point of law arising on the pleadings in an action, by way of demurrer to part of the statement of claim.

The statement of claim set forth (1.) that the plaintiff, John Woolley, was the owner and registered proprietor of the copyright in two designs for machine-made lace, which designs were duly registered in the Register of Designs kept in pursuance of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57).

(2.) That the plaintiffs, A. Herbert Woolley & Co., were lace finishers, and under a verbal agreement made between them and the plaintiff, John Woolley, the latter was bound, for certain good consideration in that behalf, to sell exclusively to A. Herbert Woolley & Co. all lace manufactured by him according to his said two designs "in the brown" or unfinished state; and

A. Herbert Woolley & Co. had, by virtue of that agreement, the exclusive right of selling lace manufactured in accordance with the said registered designs in the finished state.

(3.) That the defendant had, during the existence of the copyright in the designs, without the licence or written consent of the plaintiffs, or either of them, applied such designs, or fraudulent or obvious imitations thereof, in the class of goods in which such designs were registered, and had manufactured and sold, in the finished state, large quantities of lace to which such registered designs had been applied.

(4.) That in consequence of the premises A. Herbert Woolley & Co. had been injured, and had been unable to sell so large a quantity of lace to which the registered designs were applied as, but for the defendant's infringement or piracy thereof, they would have done, and their credit and reputation, as lace finishers and exclusive owners of novel designs in lace, had been injured.

The plaintiffs, A. Herbert Woolley & Co., claimed 50*l.* damages sustained by them in consequence of the defendant's unlawful acts in manufacturing and selling piracies of the said registered designs.

By par. 7 of his statement of defence the defendant pleaded as follows: "The defendant . . . . will submit that the statement of claim discloses no cause of action in the plaintiffs, A. Herbert Woolley & Co."

H. E. Duke, for the defendant. The statement of claim discloses no cause of action by A. Herbert Woolley & Co. The only right of action is that given by ss. 58 and 59 of the Patents, Designs, and Trade Marks Act, 1883 (1), and the right is given

(1) Sect. 58: "During the existence of copyright in any design it shall not be lawful for any person without the licence or written consent of the registered proprietor to apply such design or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale to any article of manufacture or to any substance artificial or natural, or partly artificial and partly natural; and it shall not be lawful for any person to publish or expose for sale any article of manufacture or any substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor. Any person who acts in contravention of this section shall be

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to the registered proprietor alone. The agreement set out in the statement of claim amounts to no more than a mere licence to sell the goods manufactured by John Woolley according to the designs. The copyright, under s. 50 of the Act, is in the registered proprietor during five years from the date of registration, and there are no provisions enabling a licensee to sue for infringement of copyright in a design. A licensee for the use of a patent has no right, without joining the patentee, to sue for an infringement of the patent: *Heap* v. *Hartly*. (1) [He also referred to *Power* v. *Walker*. (2)]

E. M. Daniel, for the plaintiffs, A. Herbert Woolley & Co. The allegations in the statement of claim must be taken, on demurrer, to be true, and they state a good cause of action on behalf of A. Herbert Woolley & Co. Sect. 58 of the Patents, Designs, and Trade Marks Act, 1883, makes unlawful that which the defendant is alleged to have done in par. 3 of the statement of claim. Par. 4 alleges that A. Herbert Woolley & Co. have been injured thereby; there is, therefore, an "injuria" and a "damnum" which give a right of action at common law. The case is within the rule stated by Brett, L.J., in *Bowen* v. *Hall* (3) thus: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie." That proposition is to be gathered from the judgments of the majority of the Court in *Lumley* v. *Gye*. (4) Both

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liable for every offence to forfeit a sum not exceeding 50*l*. to the registered proprietor of the design, who may recover such sum as a simple contract debt by action in any court of competent jurisdiction."

Sect. 59: "Notwithstanding the remedy given by this Act for the recovery of such penalty as aforesaid, the registered proprietor of any design may (if he elects to do so) bring an action for the recovery of any damages arising from the application of any such design, or of any fraudulent or obvious imitation thereof for the purpose of sale, to any article of manufacture or substance, or from the publication, sale, or exposure for sale by any person of any article or substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, such person knowing that the proprietor had not given his consent to such application."

(1) 42 Ch. D. 461.

(2) 4 Camp. 8.

(3) 6 Q. B. D. 333, at p. 337.

(4) 2 E. & B. 216.

Lumley v. *Gye* (1) and *Bowen* v. *Hall* (2) were referred to without disapproval in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3)

There is nothing in the Act of 1883 to cut down the right of action. Sect. 58 gives the registered proprietor the right to sue for penalties, and s. 59 gives him statutory damages. Sect. 61 shews that the person who has the right to apply the design is to be considered the proprietor; because it provides that "every person acquiring for good and valuable consideration a new and original design, or the right to apply the same to any such article or substance as aforesaid, either exclusively of any other person or otherwise, and also every person on whom the property in such design, or such right to the application thereof, shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise." A. Herbert Woolley & Co. are within those words by virtue of their contract with John Woolley, and are, therefore, to be considered as proprietors of the designs. The decision in *Heap* v. *Hartley* (4) turned only upon the difference between a mere licence to use a patent and a licence coupled with an interest.

[LAWRANCE, J., referred to *Jewitt* v. *Eckhardt.* (5)]

That case only decided that a person buying from the registered proprietor of a design had no right to be registered, and therefore could not sue as registered proprietor.

H. E. Duke, in reply, referred to *Wolverhampton Waterworks Co.* v. *Hawkesford* (6) and *Lamplugh* v. *Norton.* (7)

LAWRANCE, J. In this case I am of opinion that the defendant is entitled to our judgment. The action is brought by John Woolley and A. Herbert Woolley & Co. John Woolley is the owner and registered proprietor of two registered designs applicable to lace goods, and he has made a verbal contract with A. Herbert Woolley & Co. to supply to them, in its unfinished state, all the lace manufactured by him according to the designs. A. Herbert Woolley & Co. are to have the sole right to sell the goods when

(1) 2 E. & B. 216.
(2) 6 Q. B. D. 333, at p. 337.
(3) 23 Q. B. D. 598; [1892] A. C. 25.
(4) 42 Ch. D. 461.
(5) 8 Ch. D. 404.
(6) 6 C. B. (N.S.) 336; 28 L. J. (C. P.) 242.
(7) 22 Q. B. D. 452.

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finished. The question is, have they any right to sue the defendant under the circumstances of this case? I am of opinion that they have not. As I understood the argument of the plaintiffs' counsel, it was that any person might sue who could shew that he had been injured by an infringement of the registered proprietor's copyright in a design. I think that proposition is too wide. The case, in my judgment, turns entirely upon ss. 58 and 59 of the Patents, Designs, and Trade Marks Act, 1883, which point out what is to be done in the case of a piracy of any registered design. [The learned judge read those sections.] Here the plaintiffs, A. Herbert Woolley & Co., are seeking to recover damages arising from the defendant having applied the registered proprietor's designs to lace goods, and for having manufactured and sold the goods to which the designs had been so applied. I am of opinion that the only right to sue is that given by the Act, and the right is clearly confined, by the terms of s. 59, to the registered proprietor. There can be no doubt that the registered proprietor has a right to sue; and I should think, though I give no decided opinion upon the point, that, if he has made a contract by which he himself becomes liable to pay damages to the person with whom he has contracted, he would be entitled to recover those damages from a person who had infringed his copyright.

Our attention was called to s. 61; but that section, in my opinion, does not touch this case. It is meant to apply to cases like that of a servant who executes a new and original design for his master, and then the person for whom the design is made is to be considered the proprietor. In *Jewitt* v. *Eckhardt* (1), the plaintiff bought from an American manufacturer the exclusive right to sell in England an article designed and manufactured by the American manufacturer. Jessel, M.R., held that the plaintiff, not having the right to apply the design to any article, because the right to manufacture was expressly retained by the American manufacturer, did not become in any sense the proprietor of the design; that he, therefore, was not entitled to be registered as proprietor of a new and original design within 5 & 6 Vict. c. 100, and was not entitled to restrain

(1) 8 Ch. D. 404.

the defendant from infringing the copyright in it. Here it is clear that A. Herbert Woolley & Co. had no right to manufacture the lace goods to which the design was applied. The sole right to manufacture and the ownership of the designs were both in the hands of John Woolley; and it appears to me that A. Herbert Woolley & Co. stand in no other position than that of any outside persons who have made a contract with the registered proprietor, who is manufacturing for them, and against whom they may, or may not, have a right of action for permitting such a piracy of his design as to injure them, having regard to that contract. I am of opinion that they have no right of action because they are not the registered proprietors of the designs.

WRIGHT, J. I am of the same opinion. The question is whether the statement of claim discloses any cause of action against the defendant, so far as A. Herbert Woolley & Co. are concerned. I think it does not. It is quite clear that they cannot sue under the statute, because they are not the registered proprietors of the designs. I should think they are probably not the proprietors at all in any legal sense, and the reasoning of the late Master of the Rolls in *Jewitt* v. *Eckhardt* (1) goes to shew that they are not. But whether they are or are not the proprietors, they are not the registered proprietors, and, therefore, they have no right of action under the statute. It is said that they have a right of action at common law, and the judgments in *Bowen* v. *Hall* (2) were cited in support of that proposition. But some limitation must be implied in the application of the doctrine which is relied on; nothing which the defendant has done here is a wrongful act as against A. Herbert Woolley & Co.; although there is a "damnum," there is no "injuria" as against them. Further, the action for infringement of copyright in a design is statutory only, and the statute must be strictly complied with by the person who seeks the remedy. By the statute the action for damages is given to the registered proprietor alone, and given to him only if he elects not to proceed for penalties. If it were otherwise, a defendant might be harassed with actions brought by a number of different persons. I do not think that was

(1) 8 Ch. D. 404. (2) 6 Q. B. D. 333.

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intended: the statute meant that the right of action should be only in the registered proprietor. I may point out that the statement of claim nowhere alleges that which s. 59 makes requisite to give a right of action—namely, that the defendant knew that the registered proprietor had not given his consent to the application of the designs.

Judgment for defendant.

Solicitors for plaintiffs: *Harvey & Capron, for W. H. Speed, Nottingham.*

Solicitors for defendant: *Page & Scorer, for P. P. Truman, Nottingham.*

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Feb. 29; *March* 3.

WILMOT *v.* GRACE.

Friendly Society—Dissolution—Award of Chief Registrar—Appeal—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 25, *sub-s.* 8 (*d*), (*e*).

Where a friendly society has been dissolved by the award of the chief registrar under s. 25 of the Friendly Societies Act, 1875, a member having a claim on the funds of the society is not entitled, under sub-s. 8 (*e*) of that section, to take proceedings to set aside the dissolution merely on the ground that he is dissatisfied with the provision made for satisfying his claim.

APPEAL from a decision of the deputy judge of the county court of Derbyshire, holden at Alfreton.

The plaintiff was a member of the Ripley Baptist Benefit Society, registered under the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60). On September 26, 1891, upon the application by certain members of the society other than the plaintiff, the Chief Registrar of Friendly Societies, acting under s. 25, made an award dissolving the society. The proper notice of this award was duly given. On November 24, 1891, the plaintiff commenced an action in the Alfreton County Court against the defendant, as treasurer of and representing the society. The plaintiff's claim was as follows: "The plaintiff claims, under the Friendly Societies Act, 1875, s. 25, that he, being a member of the Ripley Baptist Benefit Society, register 279, is entitled to a weekly allowance of 3*s.* under r. 14 of the said society, and the sum of 8*l.* as burial money on death under r. 11.

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The society having been provisionally dissolved by the award of the Chief Registrar of Friendly Societies in 1891, and the sum of 2*l.* 16*s.* 2*d.* and 7¼*d.* in the pound on moneys available for division over 100*l.* having been awarded to the plaintiff as his appropriation of the funds of the said society, the plaintiff is dissatisfied with the amount of the said award, and claims against the society the sum of 21*l.* as his appropriation of the funds of the said society; and the plaintiff claims the sum of 21*l.*, or, in the alternative, that the order of dissolution be set aside."

The deputy county court judge held that he had no power to set aside or in any way vary the award of the chief registrar, and that until the award was set aside he had no jurisdiction to entertain the action.

The plaintiff appealed.

Stanger, for the plaintiff. The learned deputy county court judge was wrong in holding that he had no power to set aside or vary the award of the chief registrar. The plaintiff was entitled to appeal against the registrar's award of dissolution under s. 25, sub-s. 8, of the Friendly Societies Act, 1875 (1). Clause (*d*) of that sub-section is controlled by clause (*e*), which clearly

(1) By s. 25, sub-s. 1, a society may terminate or be dissolved in any of the following ways: (*d*) by the award of the chief registrar.

Sub-s. 8. "With respect to dissolution and the distribution of funds upon the award of the chief registrar:

"(*d*) Every award under this or the last preceding section, whether for dissolution or distribution of funds, is final and conclusive on the society in respect of which the same is made, and on all members of the same, and other persons having any claim on the funds of the society, without appeal, and shall be enforced in the same manner as a decision on a dispute under this Act;

"(*e*) Notice of every award for dissolution shall, within twenty-one days after the same shall have been made, be advertised by the central office in the *Gazette*, and in some newspaper circulating in the county in which the registered office of the society is situated, and unless, within three months from the date of the *Gazette* in which such advertisement appears, a member or other person interested in or having any claim on the funds of the society commences proceedings to set aside the dissolution of the society, consequent upon such award, and such dissolution is set aside accordingly, the society shall be legally dissolved from the date of such advertisement."

The Friendly Societies Act, 1887 (50 & 51 Vict. c. 56), s. 9, amends s. 25, sub-s. 8 (*d*) of the Act of 1875 by providing that the words "or the last preceding" shall be omitted.

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contemplates that a member may take proceedings to set aside an award of dissolution. Sect. 38 enables the Treasury from time to time to make regulations respecting registry and procedure under the Act, and generally for carrying the Act into effect, and by the regulations and forms made by the Treasury in 1888 (regulation 58, forms *ay* and *az*) it is clear that the county court is the forum in which proceedings to set aside an award of dissolution are to be taken.

Hextall, for the defendant. The county court judge held that the "proceedings" which, by s. 25, sub-s. 8 (*e*) of the Friendly Societies Act, 1875, may be taken to set aside an award of dissolution made by the chief registrar, must be proceedings in the High Court. It is submitted that that construction of the Act is the right one, and the judge therefore was right in holding that he had no jurisdiction. Sect. 38 does not empower the Treasury to make regulations as to the Court in which the proceedings are to be taken. The procedure referred to by that section means procedure in the office of the registrar. The regulation and forms relied on for the plaintiff were, therefore, ultrà vires. The award of the chief registrar was final and conclusive under s. 25, sub-s. 8 (*d*), and no appeal lies from it.

Stanger, replied.

Cur. adv. vult.

1892. March 3. CAVE, J. This is an appeal from a decision of the deputy judge of the county court of Derbyshire, refusing to entertain an action claiming relief under s. 25 of the Friendly Societies Act, 1875. The plaintiff's claim was as follows:—[The learned judge read it.]

The deputy judge held that he had no jurisdiction to vary or set aside the award of the chief registrar for the dissolution of the society. It does not appear that the attention of the judge was called to the Treasury regulations which have been brought to our notice, and his decision did not in any way turn upon them. Now, I am not prepared to decide whether a county court judge has jurisdiction under any circumstances to set aside the award of a chief registrar dissolving a friendly society; the question is one upon which I should feel considerable difficulty.

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But it is not necessary to decide it here, because there is another objection to the plaintiff's claim which is, in my opinion, fatal. By s. 25 friendly societies may be dissolved either by the agreement of the members, or by the award of the chief registrar. With regard to a dissolution by agreement of the members, any member (sub-s. 7 (*d*)) who is dissatisfied with the provision made for satisfying his claim may apply to the county court, which clearly, therefore, has jurisdiction to deal with that case. But where the dissolution is effected by the award of the chief registrar, sub-s. 8 (*d*) provides that every award under that subsection, whether for dissolution or distribution of funds, shall be final and conclusive on the society in respect of which the same is made, and on all members and other persons having any claim upon the funds of the society, without appeal; so that, so far as that clause deals with the question, there is no appeal from the award of the chief registrar. But then comes the next clause (*e*), which provides that notice of the award for dissolution shall be advertized in the *Gazette* and in a local newspaper, and that, unless within three months from the date of the *Gazette* in which such advertisement appears, a member or other person interested or having any claim on the funds of the society takes proceedings to set aside the dissolution consequent upon such award, and such dissolution is set aside accordingly, the society shall be legally dissolved from the date of such advertisement. Now, clauses (*d*) and (*e*) of sub-s. 8 must be read together, and their effect when so read is, in my opinion, this: under clause (*d*) there is no appeal from the award of the chief registrar upon the merits; the award in that respect is to be final and conclusive; but, under clause (*e*), application may be made to set aside the award, not upon the ground that it is unjust as between the parties, but upon other grounds, such as that the chief registrar has exceeded his authority, or that he has not heard all the parties interested. I desire, however, to refrain from deciding to what Court that application ought to be made. In the present case the plaintiff alleges that he has only been awarded 2*l.* 16*s.* 2*d.*, whereas he ought to have been awarded 21*l.* The appeal, therefore, is an appeal on the merits, being the very class of case to which clause (*d*) refers, and in respect of

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which it provides that the award shall be final and conclusive. Upon this ground I am of opinion that the plaintiff is not entitled to appeal from the award of the chief registrar, and therefore that the deputy county court judge was right in dismissing his claim.

WRIGHT, J. I am of the same opinion. I think the deputy county court judge was right in holding that he had no jurisdiction to entertain the plaintiff's claim. I am of opinion that the case falls within s. 25, sub-s. 8 (*d*), of the Friendly Societies Act, 1875, and therefore that the award of the chief registrar was final and conclusive, and could not be appealed from. Speaking for myself, I do not think the Treasury had any power to make the regulations and forms, which have been brought to our notice, providing for an appeal to the county court from the award of the chief registrar dissolving a friendly society.

Appeal dismissed.

Solicitors for plaintiff: *Lee, Ockerby, & Everington, for Thurman, Cattle, & Nelson, Alfreton.*

Solicitors for defendant: *Warriner & Kinch, for A. C. Peake, Ripley.*

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[IN THE COURT OF APPEAL.]

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March 10.

WARBURTON *v.* HUDDERSFIELD INDUSTRIAL SOCIETY.

Industrial Society—Application of Profits—"Lawful Purpose"—Subscription to Strike Fund—Industrial and Provident Societies Act, 1876 (39 & 40 *Vict. c.* 45), *s.* 12, *sub-s.* 7.

The application to "any lawful purpose" of the profits of an industrial society authorized by s. 12, sub-s. 7 of the Industrial and Provident Societies Act, 1876, and by the rules of the society, must be taken to mean an application to any lawful purpose ejusdem generis with the general purposes and objects of the society as contained in its rules. Where, therefore, an industrial society, established to carry on the trades of general dealers, manufacturers and farmers, passed a resolution at a properly constituted meeting, to devote a portion of the profits to a subscription to a fund for the support of workmen on strike in the neighbourhood:—

Held (affirming the decision of the Divisional Court), that, having regard to the rules of the society, the purpose was not "a lawful purpose," and that the society must be restrained from such an application of its profits.

APPEAL from a judgment of a Divisional Court, consisting of Mathew, and A. L. Smith, JJ. (1)

The Huddersfield Industrial Society, Limited, was an industrial society incorporated under the Industrial and Provident Societies Act, 1876, and having its rules registered under that Act.

By rule 2, the objects of the society were declared to be to "carry on the trades of general dealers, both wholesale and retail; also of manufacturers, farmers, and workers of mines and minerals," and the rule proceeded: "The society shall have full powers to do all things necessary or expedient for the accomplishment of all the acts specified above, including the power to purchase, hold, sell, mortgage, rent, lease, or sub-lease lands of any tenure, and to erect, pull down, repair, alter, or otherwise deal with any building thereon, and to do any other thing permitted by the Industrial and Provident Societies Act, 1876.

By rule 10 relating to the division of profits, it was provided that "the net profits of all business carried on by the society, after paying or providing for the expenses of management,

(1) Ante, p. 213.

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interest on loans, the proper reduction in the value of fixed stock, and for such interest upon the subscribed capital thereof as aforesaid, shall from time to time be applied by direction of the ordinary quarterly meeting, either to increase the capital, reserve fund, or business of the society, or to any lawful purpose; and the remainder, less any grant that may be made for educational purposes, at any general meeting, shall be divided among the members in proportion to the amounts of their purchases at the stores during the half year. . . ."

By s. 12, sub-s. 7 of the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), "The profits of the society may be applied to any lawful purpose."

At a properly constituted meeting of the society, a majority of the members present passed a resolution that a contribution of 20*l.* should be paid out of the funds of the society to a strike fund, for the support of a strike of workmen in the neighbourhood of Huddersfield.

The present action was brought by a member of the society to restrain the society from paying the contribution; and the judge of the Huddersfield County Court held that there was no power under the Act or the rules, to apply the funds of the society in that manner, and accordingly gave judgment for the plaintiff.

This decision was affirmed by the Divisional Court (1) and the defendants again appealed.

Cohen, Q.C., and *Edward Ford*, for the defendants, contended, as in the Court below, that by the Act of 1876 the society had the power to apply the profits to any lawful purpose—which the support of a strike was—and that the rules could only be looked at as regulating the mode in which the application of the money was to be made. [They referred to the following statutes: 13 & 14 Vict. c. 115 (Friendly Societies), s. 2; 15 & 16 Vict. c. 31 (Industrial and Provident Societies), ss. 1, 2; 18 & 19 Vict. c. 63 (Friendly Societies), s. 39; 25 & 26 Vict. c. 87 (Industrial and Provident Societies), ss. 3, 4; 30 & 31 Vict. c. 117 (Industrial and Provident Societies), s. 3; 38 & 39 Vict. c. 60 (Friendly

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Societies), s. 15; 39 & 40 Vict. c. 45 (Industrial and Provident Societies), ss. 6, 9, 10, 11, 12, sched. 2.]

Lane, Q.C., and *Bunting*, for the plaintiff, were not called on.

LORD HERSCHELL. I think this judgment must be affirmed. The question really turns on the construction of the 10th rule of the Huddersfield Industrial Society, read in the light of the Industrial and Provident Societies Act, 1876, by which this society is regulated, and the previous legislation on the subject. A general meeting of this society voted a sum of 20*l.*, a portion of the profits earned, to the support of a strike, although a minority objected to that application of the profits; and the simple question is whether under the rules it was lawful. Now the 12th section of the Act of 1876 with respect to the property and funds of registered societies provides in sub-s. 7 that "the profits of the society may be applied to any lawful purpose." Mr. Cohen has invited us to put a construction upon the words "any lawful purpose" there used, which, as he admits, may possibly be different to that which they bear in the rule. All I will say is this, that it may be that under s. 12 of the Act, taken by itself, it would be open to an industrial society to provide by its rules that the majority at the meeting might apply a portion of the profits to any object that was not an illegal one. I do not go beyond that, and for this reason, that in the view which I take the question does not arise for decision here; and, although it is quite natural that the defendants should desire to obtain an expression of opinion upon the point, yet I always think that there is a certain danger in the expression of an opinion upon a point of construction of importance of this description when it does not arise, because parties may be misled by it. We have no power to decide it; and other judges might take a different view afterwards, and say that the expression of our opinion was a dictum which did not bind them; and we might, if our view were erroneous, have rather misled than aided those who followed it.

Therefore I think that what we have to concern ourselves with is the construction of the 10th rule of this society, although, as I have said, I certainly do not determine in this case that the suggested construction of sub-s. 7 of s. 12 is accurate.

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Lord Herschell.

Dealing, then, with this 10th rule, it must be remembered that the 2nd rule prescribes the objects of the society, which are to carry on certain trades and do all things necessary in relation to them; and then follows the 10th rule, which says that after paying or providing for the expenses of management and so on, the profits shall from time to time be applied by direction of the ordinary quarterly meeting "either to increase the capital, reserve fund, or business of the society, or to any lawful purpose, and the remainder, less any grant that may be made for educational purposes at any general meeting, shall be divided among the members" in certain proportions.

Now we have there the words "any lawful purpose" not standing alone as in the statute; there are words preceding them and words following them which it is impossible to disconnect from them, or to disregard as throwing no light upon them. The words which precede them are that the profits may be applied "to increase the capital, reserve fund, or business of the society." Of course "lawful purpose" would cover all the objects to which the preceding words apply. Some weight, not too great I admit, ought to be attached to that; but it certainly is not uncommon, when you find general words following particular words, the general words being such as would cover all the cases to which the particular words apply, to put some limitation upon the general words, having in view the particular words with which they are associated; and I think that here that points (I do not say more) to the words "any lawful purpose" being restricted to some purpose of the society such as the previous words have relation to. I do not mean a precisely similar purpose, but something that is a purpose of the society, just as the other objects are purposes of the society.

But then comes what, to my mind, is still more important, namely, that the remainder—that is, what is left after you have applied the profits to an increase of capital, or to any lawful purpose—is to be divided, "less any grant that may be made for educational purposes." It is impossible, therefore, to read that clause without seeing that a grant for educational purposes is excluded from "any lawful purpose," because the remainder from which you are to deduct the grant for educational purposes is

what is left after allowing for all you have applied to "any lawful purpose." Therefore this clause, taken in conjunction with what I have already called attention to (I am not sure that it would not even if it stood alone), seems to me to shew that you must put a construction upon this clause which would exclude the unlimited right of the members to apply the profits of the society to any and every purpose, provided only it is not illegal. For these reasons I think the judgment must be affirmed.

LINDLEY, L.J. I also think that upon this 10th rule as it stands there is not much difficulty in deciding this case. How the question would arise if the rule were differently framed I do not know, and I do not attempt to say. In order to understand the rule as it stands, it is necessary, of course, not only to look to the rule, but to look to the Act of Parliament (39 & 40 Vict. c. 45) which relates to these societies. The important sections, to my mind, are the 9th, the 11th, and the 12th. The 9th section, sub-s. 1, says: "The rules of every society sent for registry shall contain provisions in respect of the several matters mentioned in the second schedule of the Act"; and in the second schedule, amongst the matters to be provided for by the rules of the society, are the objects of the society (I leave out other immaterial matters) and the mode of applying the profits. Now, bearing in mind that the rules are to state those two things, then the 11th section incorporates the society; and the 12th section amongst other things, says this: "With respect to the property and funds of registered societies the following provisions shall have effect." Then sub-s. 7 is: "The profits of the society may be applied to any lawful purpose." Pausing there for a moment, I cannot myself avoid coming to the conclusion that "any lawful purpose" in sub-s. 7 means any lawful purpose which is consistent with the rules. It cannot mean anything inconsistent with the rules. The rules are to provide the mode of applying the profits. I do not think it would be possible to say, for example, that if the rules prescribed a particular mode of applying the profits, any one could bring in sub-s. 7 and say: "The profits of the society may be applied to any lawful purpose; therefore we will disregard the rules." Mr. Cohen does not contend that; but he

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says that a limitation should be put on the Act—that is to say, "The profits of the society may be applied to any lawful purpose not inconsistent with the rules." Then we come to the rules. This particular rule, as to "division of profits," I confess appears to me to permit of but one interpretation. It says the net profits, after paying certain expenses, and so on, "shall from time to time be applied by direction of the ordinary quarterly meeting, either to increase the capital, reserve fund, or business of the society, or to any lawful purpose, and the remainder, less any grant that may be made for educational purposes at any general meeting, shall be divided among the members of the society." What can "any lawful purpose" there mean? Can it mean "any lawful purpose under the sun"? or is it "any lawful purpose of the society"? If you look at the context, that which precedes, and that which follows, I do not think anybody, certainly I do not think any lawyer, would construe "any lawful purpose" in the wide way in which Mr. Cohen invites us to construe it. I have no doubt that the construction put on it by Lord Herschell is the right one. That disposes of this case; and I say nothing of the meaning of the 7th sub-section of s. 12 of the Act standing by itself.

KAY, L.J. I agree in the conclusion that has been arrived at; and I only wish to add a few words for the purpose of stating that I desire to reserve my opinion on what may be the extent of the meaning of the words in the 7th sub-section of s. 12 of the Act of Parliament, which says, "The profits of the society may be applied to any lawful purpose." On that I give no kind of opinion at present.

There is another question among those argued for the defendants, on which I also desire to reserve my opinion, which is this: Under the 9th section of the Act and the second schedule of the Act, which is referred to in the 9th section, the rules are to contain, amongst other things, provisions for the mode of application of the profits; and whether or not those words include the purposes for which the profits are to be applied, I give no opinion upon at present.

The only point upon which we need give any decided opinion

now is the meaning of this 10th rule. I have followed with great pleasure the judgment of Lord Herschell upon that; and I agree with it so entirely that it would be mere repetition on my part to go over the rule again. The grammatical construction of the rule, looking at the words of it, seems to me to be clearly that "lawful purpose" mentioned in that rule means "lawful purpose of the society"; and that is enough for the decision of this particular case.

Appeal dismissed.

Solicitors for both parties: *Learoyd, James, & Mellor, for Learoyd, Huddersfield.*

M. W.

[IN THE COURT OF APPEAL.]

PALMER *v.* CALEDONIAN RAILWAY COMPANY.

Practice—Service of Process—Railway Company—Principal Office—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *s.* 135, *Order* IX., *r.* 8.

The defendants, a railway company incorporated by Act of Parliament, had the principal part of their line in Scotland, and the office from which the whole was controlled and managed was at Glasgow. A small portion of the line was in England, and at Carlisle the defendants had goods and locomotive depots, joint use of the passenger station, and an office for their district traffic superintendent. The defendants' special Act incorporated generally the Companies Clauses Consolidation (Scotland) Act, 1845, and also incorporated the Companies Clauses Consolidation Act, 1845, so far as might be necessary for carrying into effect the object and purposes of the Act in relation to the portion of the railway and works in England. The plaintiff sued the defendants for false imprisonment and breach of contract, and served the writ by leaving it at the office of the district traffic superintendent at Carlisle. On an application to set aside the writ and service of the writ:—

Held, reversing the decision of the Queen's Bench Division, that the writ and service must be set aside, since

(i.) The defendants were primâ facie a Scotch company, and the incorporation of the English Act for a limited purpose, and the fact that a part of the line was in England, did not make them an English company;

(ii.) The defendants' principal office was that at which the control and management of the undertaking was carried on, and the service at Carlisle was consequently not service at a principal office of the defendants within s. 135 of the Companies Clauses Consolidation Act, 1845;

(iii.) The application of Order IX., r. 8, was excluded by the incorporation in

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the defendants' special Act of the statutory provisions relating to service of process contained in the Companies Clauses Consolidation (Scotland) Act, 1845.

Wilson v. *Caledonian Ry. Co.* (5 Ex. 822) dissented from.

APPEAL from an order of the Queen's Bench Division, dismissing an application by the defendants to set aside the writ in the action and the service thereof. (1)

The defendants are a railway company, incorporated by 8 & 9 Vict. c. clxii. The first section of that Act recites that the making of a railway leading from the city of Carlisle to the cities of Edinburgh and Glasgow, and to the northern parts of the kingdom of Scotland, would be of great public advantage, and incorporates the Companies Clauses Consolidation (Scotland) Act, 1845, the Lands Clauses Consolidation (Scotland) Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. cc. 17, 19, & 33), so far as not otherwise provided by the reciting Act. The second section recites that a portion of the railway and works thereinafter authorized to be made and maintained would be situate in that part of the United Kingdom called England, and enacts, "so far as may be necessary for carrying into effect the object and purposes of this Act in relation to such portion of the said railway and works, the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. cc. 16, 18, & 20), shall apply to and form part of this Act."

The whole of the defendant company's line is in Scotland, with the exception of six miles between the border of Scotland and Carlisle. At the latter place the company have an office for the control, conduct, and management of the traffic in that district, and they own a goods depot and a locomotive depot, and jointly own a passenger station there; but they claimed to be a company domiciled in Scotland with their head and only principal office at Glasgow.

The writ claimed damages for false imprisonment and for breach of a contract to carry the plaintiff by the defendants' railway and for money received, and it was served by being left

(1) Ante, p. 607.

with the defendants' district traffic superintendent at his office at Carlisle.

The contract for breach of which the plaintiff claimed damages was made in Carlisle, where he took a return ticket between that place and Glasgow, and the plaintiff contended that it should have been performed and completed at Carlisle within the jurisdiction of the High Court of Justice. The defendants claimed that the alleged assaults and false imprisonment took place at the railway station at Lockerbie in Scotland, and that the alleged breach of contract was also entirely made in Scotland, and that no cause of action arose within the jurisdiction of this Court.

Application to set aside the writ was made to a Divisional Court on the grounds that the service was irregular, inasmuch as it was not effected in accordance with the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16, s. 135), and that the defendant company was domiciled in Scotland, where its only principal office is situate.

The Divisional Court dismissed the motion. (1)

The defendants appealed.

Asquith, Q.C., and *Page*, for the defendants. The defendants are a Scotch corporation domiciled in Scotland, beyond the jurisdiction of this Court. The Court below held that the defendants were both a Scotch and an English company in consequence of the provisions of the special Act, and following the decision in *Wilson* v. *Caledonian Ry. Co.* (2) But the application of the English Acts is confined to such questions as arise in respect of their land in England, while the complaint in this case is in respect of matters arising in Scotland. The defendants are in no sense an English corporation, nor are they domiciled or ordinarily resident within the jurisdiction so as to come under Order XI., r. 1 (*c*). Even if the writ was properly issued, the service was irregular. Order IX., r. 8, provides for service on corporations, but only "in the absence of any statutory provision regulating service of process." Here there is, under s. 135 of the Companies Clauses Consolidation Act,

(1) Ante, p. 607.

(2) 5 Ex. 822.

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240) (1), a statutory provision that service is to be at the principal office or one of the principal offices of the company. If that section is not applicable the identical section (s. 247) of the Companies Clauses Consolidation (Scotland) Act, 1845, applies, and the objection will hold good. Principal does not mean merely important, but it means an office wherein the concern is managed and conducted: Pierce v. Great Western Ry. Co. (2); Simon v. London and North Western Ry. Co. (3).

T. Willis, Q.C., and Bennett, for the plaintiff. The special Act constitutes the defendants an English company. This was decided in 1846 in Wilson v. Caledonian Ry. Co. (4). There certain that this is an English company and they may be sued here for any cause of action wherever arising, provided the service is right. Service under s. 135 of the Companies Clauses Act, 1845, is to be at one of the principal offices of the company—that is, at the principal office within the jurisdiction. Certain it clearly the defendants' principal office within the jurisdiction, as they have besides only one small station in England. Even assuming that the defendants have a branch office, the service is sufficient under Order xi., r. 8. [They cited Newby v. Colt's Patent Firearms Co. (5); Jones v. Scottish Accident Insurance Co. (6); Wallace v. Scottish Imperial Insurance Co. (7); Bhojraj v. Compton (Example (8).]

Asquith, Q.C., in reply.

(1) 8 & 9 Vict. c. 18, s. 135. "Any summons or notice or any writ or other proceeding at law or in equity requiring to be served upon the company may be served at the office or other place appointed by the company for the purpose, or if no such office or place shall be appointed, if there be only one office of the company, or one principal office, at such office, and if there be more than one office, at any one of such offices, by delivering the same to the secretary or to the chief clerk or principal officer of the company, or by leaving the same at the office, or by sending the same through the post in a prepaid letter addressed to the secretary at his office."

Sect. 138 of the Lands Clauses Consolidation Act, 1845, and s. 128 of the Lands Clauses Consolidation Act (Scotland), 1845, are to the same effect, and s. 247 of the Companies Clauses Consolidation (Scotland) Act, 1845, s. 138 of the Railways Clauses Consolidation Act, 1845, and s. 247 of the Railways Clauses Consolidation Act (Scotland), 1845, are framed in terms with this section.

(2) E. B. & E. 627.
(3) 2 B. & S. 826.
(4) 5 Ex. 832.
(5) Law Rep. 7 Q. B. 293.
(6) 17 Q. B. D. 477.
(7) 21 Q. B. D. 36.
(8) 23 Q. B. D. 328.

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LORD ESHER, M.R. It is said that this is partly a Scotch and partly an English company. Now, it is one company with one governing body, and it seems to me we cannot say it is two companies, which is, in other words, saying it is a company partly in Scotland and partly in England. In my opinion, it is a Scotch company with its governing body resident and domiciled in Scotland. There are certain powers given to it with regard to things which the company may do in England, and the special Act makes a limited portion of what the company can do to be governed by English law. The Act says, that "so far as may be necessary for carrying into effect the objects and purposes of this Act in relation to such portion of the said railway and works"—that is, in relation to the portion which is to be situated and made and maintained in England—the Companies Clauses Act shall be applicable. That does not make the Companies Clauses Act apply to the whole undertaking, but only to a limited portion of it; and we have therefore a Scotch company which, as to a limited portion of its objects and purposes, is made subject to an English Act of Parliament.

Is the present case within this clause? Is it necessary for the purpose of carrying into effect the objects and purposes of the Act in relation to the six miles of the line in England that the Companies Clauses Act should be read in and applied to the present proceedings? Certainly not. All that is required can be done under Scotch law, and there is no need to apply any English Act.

That being so, we have a Scotch company to be served with a writ, and the question is whether Carlisle is the principal office, or one of the principal offices, of the company. I should have thought without any authority that the principal office of the company must be the place at which the business of the company is controlled and managed. The only office that answers this description is the company's office at Glasgow. No part of the business of the company is controlled or managed, in the sense that it is independently controlled or managed, at Carlisle. The directors meet at Glasgow, and the office from which and through which they manage the business of the company is at Glasgow. If the expression "principal office" means the office at which the

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business of the company is managed, it does not apply to Carlisle; and the service of the writ at the office there was not a service at the principal office of the company, and must be set aside.

FRY, L.J. I am of the same opinion. Two points have been urged before us—one arising on the Companies Clauses Consolidation Act, and the other under the general orders of the Court. As to the first point, it is said that the Caledonian Railway Company is a company which is partly English and partly Scotch, and that it has an English and a Scotch domicil, and is regulated partly by the Companies Clauses Act of Scotland and partly by the Companies Clauses Act of England. It is further said that when the 135th section of the English Act is read the principal office there referred to must be the principal office as regards the English undertaking, and that must be Carlisle, because there is no more principal or more important office than that at Carlisle. It appears to me that this is not an accurate argument, and for this reason, that the statute which incorporates the company seems to indicate that, although for some purposes its proceedings are to be governed by English law, yet it is to be regarded as principally Scotch, and accordingly the Scotch general Acts, the Companies Clauses, the Lands Clauses, and the Railways Clauses Consolidation Acts for Scotland, are incorporated generally and without limitation. Primâ facie, therefore, the Company is to be regarded as a Scotch corporation; but as the legislature were alive to the fact that a portion of the undertaking was to be constructed in England, a recital to that effect was introduced, and it was provided that, so far as might be necessary for carrying into effect the objects and purposes of the Act in relation to such portion of the railway and works, the English consolidating Acts should be incorporated. They are, therefore, incorporated for a limited and particular purpose only—that is, so far as the objects and purposes of the Act relate to the English portion of the line.

Is it necessary that an action on contract, or for trespass or tort, should be commenced by a proceeding served at an English office? There can be, as it appears to me, no such necessity, for there is no reason why the corporation should not for such a

purpose be treated as a Scotch corporation. Therefore, it does not appear to me that the 135th section of the Companies Clauses Act is incorporated at all, or, if incorporated, it is not incorporated for the purpose of giving a place of service within the jurisdiction.

It is then said that under the general rules of the Court there is a power to serve a process against a corporation aggregate, whether constituted by the laws of this or of some other country, provided that in the latter case it has a place of business in this country, and *Newby* v. *Colt's Patent Firearms Co.* (1), which has been approved by the Court of Appeal, is cited. I am not inclined in any way to diminish the authority of that case. I think it is of great importance, in a country like ours, where foreign corporations carry on business to a large extent under the protection of our laws, that they should, by having a place of business within the jurisdiction, subject themselves to the jurisdiction of the Courts. But it is to be observed that the rule of the General Order that provides for service upon corporations aggregate provides a particular mode of service in the absence of any statutory provision. I read that to mean any provision of a statute passed by the Imperial Parliament, whether it relates to service in this country or any other place which is subject to the Imperial Parliament. In this case Parliament has, by incorporating the Scotch Companies Clauses Consolidation Act into the special Act of the company, provided a statutory mode of service. The exception, therefore, which is found in the Order of Court exists, and it follows that service cannot be effected in this case under that Order. I think, therefore, both the points relied on fail, and that we ought to reverse the decision of the Court below.

LOPES, L.J. I am of the same opinion. It was contended that the Caledonian Railway Company was in point of fact two companies—one Scotch and the other English; one domiciled and resident in England, and the other in Scotland. I cannot agree to this. It appears to me to be one company, and that a Scotch company, having its principal office at Glasgow. What I understand by principal office is that office where the general

(1) Law Rep. 7 Q. B. 293.

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superintendence and management of the business of the railway is carried on, and as to that I may refer to *Garton* v. *Great Western Ry. Co.* (1)

In this particular case the special Act of the Caledonian Railway Company becomes important. Referring to s. 1, we find that there is incorporated generally the Companies Clauses Act of Scotland; but by s. 2 the Companies Clauses Act of England is incorporated to a limited extent and with a material qualification, which makes it applicable only so far as may be necessary for carrying into effect the objects and purposes of the Act in relation to that portion of the railway situated in England. Under these circumstances, I do not think that s. 135 of the Companies Clauses Act of England is incorporated; because I am unable to see that such an incorporation is necessary for carrying into effect the object and purposes of the Act with regard to that portion of the line which is situated in England. However that may be, coming to the terms of s. 135, we find that proceedings that require to be served may be left at or transmitted through the post to the principal office, or one of the principal offices, of the company. On this I have no hesitation in saying that the principal office of the company for the purposes of this section, or the similar section of the Scotch Act, is at Glasgow, and that on this point also the argument for the plaintiff fails.

Another point is raised under Order IX., r. 8, and it is said that under that rule there has been a good service on the company as a corporation aggregate. I think this argument has been disposed of by the reference to the words at the commencement of the rule, "in the absence of any statutory provision with regard to service of process." Here there is such a statutory provision, and the rule does not apply.

I am therefore of opinion that the writ was improperly served at Carlisle, and that the service ought to be set aside.

Appeal allowed.

Solicitors for plaintiff: *Wood & Wootton.*

Solicitors for defendants: *Currey & Hawkins.*

(1) E. B. & E. 857.

A. M.

[IN THE COURT OF APPEAL.]

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SANDGATE DISTRICT LOCAL BOARD OF HEALTH *v.* KEENE.

March 12.

Local Government—Public Health Acts—Streets—Paving, Sewering, &c.—Apportionment of Expenses—Dispute as to Apportionment—Arbitration—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

Where an urban authority gives notice to the owners and occupiers of premises fronting, adjoining, or abutting on a street, that requires to be sewered or otherwise dealt with under s. 150 of the Public Health Act, 1875, and in default executes the work, and the expense is apportioned by the surveyor, any dispute arising on the apportionment, whether as to amount or otherwise, must be dealt with by arbitration in the manner provided by the Act, and the urban authority cannot proceed to recover the amount apportioned from any owner who has given notice that he disputes the apportionment.

Decision of Bacon, V.C., in *West* v. *Downman* (14 Ch. D. 111), disapproved.

APPEAL from a judgment of the Queen's Bench Division.

The action was brought in the county court to recover from the defendant the apportioned part of the expense of paving and doing other works to a street not being a highway repairable by the inhabitants at large. The property of the defendant adjoined the street, and notice to do the necessary work was given to the owners of adjacent property, and failing their compliance with these notices the work was done by the local board, an apportionment of expenses made, and notice of apportionment given. Only one footpath to the street was made, and that was on the farther side of the road from the defendant's property. On receipt of the notice of apportionment the defendant wrote as follows: "I have to point out that an error has been made in charging 25*l.* 19*s.* 11*d.* out of a total cost of 61*l.* as the amount due from me on the Grafton House property, as no paving, curbing, or channeling, has been done to the portion of the road that my land abuts on; therefore I request you to go more carefully into the matter, and forward to me an amended statement." The board did not comply with this request, and demanded the apportioned sum to recover which they brought this action.

It was objected at the trial that the action would not lie, as there had been a dispute which should have been referred to

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arbitration under the 150th section of the Public Health Act, 1875. (1)

The county court judge was of opinion that the defendant's letter disputed the apportionment, but that where liability as well as amount was in dispute, the Court had jurisdiction to decide the case, and he directed the jury to find a verdict for the plaintiffs. (2)

The case came before two judges of the Queen's Bench Division. who differed in opinion, and the decision of the county court judge was affirmed.

The defendant appealed.

Finlay, Q.C., and *A. Macmorran*, in support of the appeal. The defendant is entitled, under s. 150, of the Public Health Act, 1875, to have the proportion of the expenses payable, in respect of his premises, settled by arbitration in the manner provided by ss. 179 and 180 of the Act, and until that has been done the Local Board cannot maintain an action against him. There has been a "dispute" between the defendant and the Local Board within the meaning of s. 150: *Midland Ry. Co.* v. *Watton*. (3) The object of the provision for arbitration was to save expense.

(1) By s. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriageway, footway, or any other part of such street is not sewered, levelled, paved, metalled, flagged, channeled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channeled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same, within a time to be specified in such notice . . . "If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein, and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses."

(2) By s. 261 demands below fifty pounds may be recovered in county courts.

(3) 17 Q. B. D. 30.

Meadows White, Q.C., and *R. Cunningham Glen*, for the local board. The "dispute" referred to in s. 150 is a dispute as to the apportionment of the expenses. The only apportionment which can be made, either by the board's surveyor or by an arbitration, is an apportionment according to frontage. It is not disputed in the present case that the apportionment has been correctly made according to frontage. The real dispute is whether, where one owner of land abutting on the street does not derive any benefit from a part of the work which has been done, he ought to be charged any proportion of that part of the expense which is attributable to that part of the work. Here the defendant derives no benefit from the flagging, curbing, and channeling of the footpath on the opposite side of the street; no flagging, curbing, or channeling has been done on his side. Whether he is liable in respect of the cost of that work by which he is not benefited is a question of law on the construction of the Act, and it was not intended that such a question should be decided by an arbitrator. The question is not as to the accuracy of the apportionment, but as to the principle on which the apportionment ought to be made. In *Midland Ry. Co.* v. *Watton* (1), the question was whether the plaintiffs had not been charged in respect of a greater frontage than they really possessed. That was a mere question as to the accuracy of the apportionment. The defendant might have seen from the plans deposited, under s. 150, that the flagging, &c., was to be done only on one side of the street, and his remedy, if he objected to this, was to appeal to the Local Government Board, as provided by s. 268: *Reg.* v. *The Local Government Board.* (2)

The county court judge acted on the authority of *West* v. *Downman.* (3) The dispute which is to go before the arbitrator must be as to a matter which the arbitrator has jurisdiction to decide, and other disputes must be determined by an ordinary tribunal.

[They also cited *Cook* v. *Ipswich Local Board.* (4)]

LORD ESHER, M.R. I think this appeal must be allowed. The statute has made new obligations, and has indicated the

(1) 17 Q. B. D. 30.
(2) 10 Q. B. D. 309.
(3) 14 Ch. D. 111.
(4) Law Rep. 6 Q. B. 451.

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course of proceedings that are to be taken in case of dispute. In the case of *West* v. *Downman* (1), the local authority wished to prove for the apportioned expenses in an administration suit as if the claim arose on a contract. That is, they claimed to prove as if for a debt, but failed because all proceedings on a liability arising under the statute must be taken in the manner provided. In the present case the defendant has raised no objection on any of the preliminary stages, and it must be taken that the action of the local board was correct and the expenses properly incurred. Then what is the next step? The surveyor is to apportion the expense among the persons on whom it is to fall. If no dispute is raised, but a person charged does not pay, the local authority may go before a court of summary jurisdiction to enforce payment. But if the person charged disputes the apportionment, all he need do is to say that he disputes the accuracy of the apportionment made by the surveyor on him. Such a dispute is to be settled by arbitration. That really is all we have to determine, and there is nothing to entitle us to read the statute otherwise than according to the grammatical construction. This construction of the statute does not leave the parties without remedy for a mistake in law by the arbitrator, for he can be asked to state a case, and can be directed by the Court to do so if he declines, and so questions of law can be brought before the Court. I think the view taken by the board in not proceeding to arbitration but endeavouring to enforce their claim otherwise, was wrong, and that the appeal must be allowed.

I wish to add that we do not agree with the dictum of Bacon, V.C., in *West* v. *Downman*. (1)

FRY, L.J. The question turns on the meaning to be attached to the words "in case of dispute," which occur in the section empowering the local authority to recover in a summary manner the expenses incurred by them in sewering and otherwise making up a street in default of its being done by the owners and occupiers of adjacent premises. The expenses are to be recovered from the owners in default according to the frontage of their

(1) 14 Ch. D. 111.

respective premises and in such proportion as is settled by the surveyor of the urban authority. It is clear that the proportion which is to be recovered from an owner is the sum of money which the surveyor has found to be due, having regard to the frontage of the owner's premises, and that the expression "in case of dispute," refers to all disputes that may arise as to the proportion to be borne by the owner. The appellant contends that there has been such a dispute, and that the matter should have gone before an arbitrator. The respondents, on the other hand, say that the clause applies only to a dispute as to what is the extent of frontage of the owner. I think it is enough that there is a dispute, and that the board have no right to call on the owner to say why he disputes his liability to pay the amount they claim. If there is a dispute, the matter must go to arbitration. It may well be that the arbitrator may have to determine matters arising on the construction of the statute, the total amount of the expenditure, and the physical facts of the case, but this consideration does not and cannot govern the interpretation of the section.

As to the question whether there was a dispute in this case as to the amount claimed, I think it is a mistake to say that the appellant's letter does not shew such a dispute. It appears to me that he was not disputing his liability to pay something, but disputing the amount assessed on him as a frontager.

LOPES, L.J. I am of the same opinion. It seems to me impossible to say that whether the defendant is right or wrong in his contention, the letter does not raise a dispute as to the apportionment. But it is said that the dispute contemplated by the statute is not one in regard to the construction of the Act or any question of law. I cannot read the words in that restricted sense, or otherwise than as dealing with any dispute that may arise. No hardship will arise from this view because if any question of law comes before the arbitrator, he has full power to state a case, and would be compelled to do so if there were any question that he ought to raise for the determination of the Court. It is clear, therefore, that the board followed a wrong course in proceeding to enforce their claim instead of referring the dispute to arbitration. I think that the view of

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Bacon, V.-C., on the authority of which the county court judge decided in favour of the plaintiffs cannot be maintained, and that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Talbot & Tasker, for A. D. & L. J. Brockman, Folkestone.*

Solicitors for defendants: *Geo. Kebbell & Miller.*

A. M.

1892 *May* 2.

THE LOCAL BOARD OF WIMBLEDON *v.* UNDERWOOD. SIMMONS, CLAIMANT.

Local Government—Rate—Default in Payment—Judgment in County Court—Execution—Claim of Bill of Sale Holder—Validity of Bill of Sale against Distress Warrant for Rate—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 256, 261—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 14.

By s. 14 of the Bills of Sale Act (1878) Amendment Act, 1882, "A bill of sale . . . shall be no protection in respect of personal chattels included in such bill of sale, which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates":—

Held, that the section did not apply where proceedings for the recovery of the rate had been taken in the county court under s. 261 of the Public Health Act, 1875, and not by distress warrant under s. 256.

APPEAL by the claimant from the decision of the judge of the Kingston County Court.

On September 5, 1890, Mrs. Underwood, who was assessed to a general district rate due to the Wimbledon Local Board under s. 210 of the Public Health Act, 1875, gave to the claimant a bill of sale over her goods and furniture, duly executed and registered. Having made default in the payment of the rate, the local board took proceedings against her in the county court under s. 261 of the Public Health Act, 1875, and recovered judgment and issued execution against her for the amount. The claimant claimed the goods seized in execution as being comprised in his bill of sale, and an interpleader issue was ordered, which came on for trial at the Kingston County Court. The local board contended that the bill of sale did not protect the goods from seizure under s. 14 of the Bills of Sale Act (1878)

Amendment Act, 1882 (1), and the county court judge upheld their contention, and gave judgment for them accordingly. The claimant appealed.

Holmes Poulter, for the claimant. The section only applies to cases of the recovery of a rate by distress warrant, and not to a case of the recovery of a rate by ordinary execution under a county court judgment. The local board have precluded themselves from issuing a distress warrant, since they have chosen to proceed in the county court under s. 261 of the Public Health Act, 1875, and not under s. 256, which prescribes the procedure by means of a distress warrant. They have, however, by taking the alternative remedy, obtained a right against the person of the defaulter which they would not have got if they had proceeded by distress warrant.

In the second place, a general district rate, levied under s. 210 of the Public Health Act, 1875, is not either a tax or a "poor or other parochial rate" within the meaning of s. 14 of the Bills of Sale Act, 1882.

C. Tyrrell Gies, for the local board. The fact that the local board have chosen to proceed in the county court under s. 261, instead of by distress warrant under s. 256 of the Public Health Act, 1875, does not deprive them of the benefit given to them by s. 14 of the Bills of Sale Act, 1882. The object of that section was to give to any claim for rates a priority over a claim by a bill of sale holder.

Secondly, in this case the parish and the district are coterminous, and the district rate is, therefore, a parochial rate.

DAY, J. I am of opinion that this appeal must be allowed. The local board rely upon the provisions of s. 14 of the Bills of Sale Act (1878) Amendment Act, 1882, and say that this bill of sale does not protect the goods from the execution levied upon them. That section enacts that a bill of sale shall be no protection to personal chattels included in such bill, "which but for

(1) By the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 14, "A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale, which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates."

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such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates." It is contended that by reason of that section a bill of sale which is admittedly valid does not protect the goods comprised in it from execution levied for the payment of rates. Whether the rate in question is a tax or a parochial rate or not is a question which it is not now necessary to determine. No doubt it might be a very important question if we took a different view of the first point raised before us; but it is now immaterial, because, in my opinion, the section has no operation in the case of such an execution for rates as in the present case. I do not think that the effect of the section is to render the goods comprised in this bill of sale liable to be seized in this execution. The section is no doubt extremely ill-framed, and it is so awkwardly drawn that it is obvious that it does not express what the legislature intended to say. The legislature could not possibly have intended that a bill of sale should be no protection to any goods whatsoever. It cannot be intended that any goods which are of such a nature as to be liable to distress should be liable to be seized notwithstanding that they are covered by a prior valid bill of sale. Clearly the object of the section was to exempt from the protection of a bill of sale goods which could be distrained for parochial rates and to say that such goods should be liable to be distrained for those rates notwithstanding that they were covered by a bill of sale. It would be absurd to read the section as applying to all goods which might under any circumstances be distrained for rates. It is necessary, therefore, to find some limit to the section, and that is I think to be found in the process to which the section refers. As I read the section, the words "which but for such bill of sale would have been liable to" are equivalent to the words "as against," and the section reads that a bill of sale "shall be no protection in respect of personal chattels included in such bill of sale as against distress under a warrant for the recovery of taxes and poor and other parochial rates."

That, as it seems to me, is the only construction which will give to the section the meaning which must have been intended by the legislature; any other construction involves us in a

palpable absurdity. I think that the section only destroys the effect of the bill of sale as against a distress, and does not affect it as against such an execution as in the present case. The appeal, therefore, must be allowed.

CHARLES, J. I am of the same opinion. The claimant is the owner of the goods in question by virtue of a bill of sale which is admitted to be perfectly valid; but it is sought to take away his right to the goods by the operation of s. 14 of the Bills of Sale Act, 1882. The rate in respect of which the contention arose was a general district rate, and I desire to offer no opinion now as to whether such a rate is a tax or a poor or other parochial rate within the meaning of the section. Assuming that it does fall within the section, I entirely agree with the view that has been expressed by my brother Day. I think that the section only destroys the protection of the bill of sale where the parish authority either has issued or is in a position to issue a distress warrant for rates. Here they have chosen to adopt another course, and have proceeded in the county court and levied execution in accordance with the provisions of s. 261 of the Public Health Act, 1875. They are, therefore, not in a position to issue a distress warrant. In order to do that, they must have summoned the person making default in payment before a court of summary jurisdiction, and have got from it an order for payment under s. 256. They did not, however, proceed under that section. They have chosen to adopt the alternative remedy given by s. 261, and to take proceedings in the county court. They have neither issued a warrant of distress, nor are they in a position to do so, and they are unable, therefore, to maintain that the bill of sale holder has lost his right to the goods under s. 14 of the Act of 1882. As has been pointed out, they have obtained by the adoption of the alternative remedy other rights against the person of the defaulting ratepayer which they would not have got if they had proceeded by distress warrant under s. 256. I agree, therefore, in thinking that this appeal must be allowed.

Solicitor for claimant: *Harold S. Simmons.*
Solicitor for local board: *W. H. Whitfield.*

A. P. P. K.

1891
July 10, 14; *Nov.* 17, 18, 19, 21; *Dec.* 21.

1892
May 4.

THE MAYOR, &c., OF NEW ROMNEY *v.* COMMISSIONERS OF SEWERS OF NEW ROMNEY.

Sewers—Commission of—Jurisdiction of Commissioners—Evidence—Level of New Romney.

The Guildhall and Assembly Rooms of the town of New Romney are not within the area of the jurisdiction of the commissioners of sewers of New Romney.

ACTION tried before Lord Coleridge, C.J., without a jury.

The action was brought by the Corporation of the Borough of New Romney as owners of the Guildhall and the Assembly Rooms of that town to obtain a declaration that such Guildhall and Assembly Rooms were not within the limits of the jurisdiction of the defendants, and that the defendants were not entitled to scot or rate the corporation as the owners of the said buildings towards the expense of maintaining the sea defences and drainage works of the New Romney level. The defendants claimed to derive jurisdiction to scot the said property of the plaintiffs from a commission issued in the year 1852.

The facts appear from the judgment. The plaintiffs relied in the main upon a map, made in the year 1832 by a Mr. Woollett for the purposes of an inquisition held under the authority of a commission issued in that year, as shewing that the said corporation buildings were not within the limits of the level. In that map the said buildings were not included within the level, and in that inquisition of 1832 the jury presented that such map was and should be taken as the map of the level. On the other hand, the defendants contended that such presentment by the jury in 1832 was ultra vires, and that a map made under the authority of one commission could not bind the commissioners under a future commission. They also contended (inter alia) that as the commission of 1852 did not in terms define the limits of the level, they were entitled to treat as within those limits all land which would derive benefit from the execution of the works; and they called evidence to shew that unless the works, towards the expense of which it was proposed to scot the plaintiffs' property, were executed, there would be considerable risk that the

sea would, in course of time, cover the land surrounding the town of New Romney, and so cut off the town from communication with the mainland, if, indeed, there would not be danger of the town itself being ultimately undermined by the sea. And they cited the case of *Soady* v. *Wilson* (1) as an authority for the proposition that under the Statute of Sewers every person whose property derives benefit from the works of the commissioners is liable to be rated, although the benefit be not immediate.

Sir H. James, Q.C., McCall, Q.C., Wood Hill, and *Walker,* for the plaintiffs.

Jelf, Q.C., Elton, Q.C., and *Henry Terrell,* for the defendants.

Cur. adv. vult.

Dec. 21. LORD COLERIDGE, C.J., delivered the following written judgment. This case was heard before me without a jury in the months of July and November of the present year; and in July I went to New Romney and inspected the town and level of New Romney and some portion of the adjacent country. I now proceed to give judgment, and to state the reasons which have led me to that judgment.

It is an action in which the plaintiffs, the mayor and corporation of New Romney, claim against the defendants, the commissioners of the level of New Romney, a declaration of the Court:

1. That the defendants are not entitled to levy certain scots or rates upon the property of the plaintiffs.

2. That the defendants' notices to the plaintiffs to pay such scots or rates are bad and should be set aside.

3. That an injunction should issue restraining the defendants from levying, or attempting to assess or levy, any scot or rate upon the property of the plaintiffs.

It is a question of jurisdiction, and of jurisdiction only. If the defendants have jurisdiction, the exercise of it is a matter for their discretion. I need not cite authorities in support of a proposition so well established. Granting for the moment that the defendants have jurisdiction, the mode in which and the extent to which they have exercised it cannot be, indeed are not,

(1) 3 A. & E. 248.

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questioned in this action. Jurisdiction, indeed, must be exercised according to the forms and the substance of law; but if they are observed, this Court has no powers of appeal or of correction.

The general jurisdiction of the defendants is founded upon the Statute of Sewers (23 Hen. 8, c. 5); but from 1531, when that statute was passed, down to the reign of Queen Anne in 1709, no regular commission appears to have been appointed under it; at least as far as the level of New Romney is concerned, in respect of which level only the present question has arisen.

The creation of the various levels which adjoin and surround the town and level of New Romney, though of great interest to the historian and geographer, is unimportant to the lawyer, who has to deal with the questions raised in this case only. Speaking generally, it is manifest that the face of the country is altogether changed from what it was—I will not say when Julius Cæsar landed, but from comparatively recent times when New Romney became one of the Cinque Ports, and when the ships of those days came up to the walls of a town, now near two miles from the sea, and inaccessible even by means of the small streams and ditches which flow by it and from it into the English Channel.

New Romney was for many years after the passing of the Statute of Sewers in constant perils from the inroads of the water, and expended large sums of money in defending itself against them. Extracts from the accounts of the chamberlain of New Romney from 1528 to 1580 have been put in evidence, and they shew the constant expenditure of sums of money, relatively large, on sea defences and repairing the mischiefs of sea encroachments by the corporation of New Romney. A commission with articles and instructions for inquisition and survey was put in before me, issued out of the Exchequer in the 5th of Elizabeth, 1563, from the return to which it appears, amongst other things, that the town had spent under that head alone 400*l.* in the course of twenty years. I am not certain from the language of the return whether a sum averaging 10*l.* a year expended by the town for the same purpose is included in or excluded from the sum of 400*l.* It is not material to determine this point. It is enough that during the whole of the 16th century the corpora-

tion of New Romney defended themselves, and expended large sums of money in defending themselves, from the incursions of the sea. I have not thought it worth while to go further back, but I may observe in passing, lest I might seem to have forgotten it, that the same general result may be gathered as to the 15th century from the extracts put in from the assessment books of the New Romney corporation during the years which elapsed from 1448 to 1523. Very little evidence was given as to the 17th century. It may be taken that, as both parties were ably represented, and both had access to all the documents bearing upon the question, nothing could be found varying the general state of things which the evidence relating to the 15th and 16th centuries shewed to exist during that long period of time. Two documents were put in, one shewing the origin of a composition paid by certain lands in New Romney to the level of Romney Marsh, and dated 1663–64; the other an undertaking by certain persons to contribute to the future repairs of "the gutte" on condition that the repairs then needed should be executed at the costs and charges of the corporation of New Romney. This agreement is dated in the 4th of James II., 1688. Both papers are interesting, but they throw no light, I think, upon the foundation of the jurisdiction of the defendants in this action.

With the 18th century, however, a different state of things comes into existence; and in 1708 the corporation finding that lands belonging to them situated "in the levell commonly called Romney Levell," have been "very much damnified" for "the want of a convenient sewer," resolve as follows: "That the maior and jurats for the time being doe concert such measures with the other landlords and persons concerned in the said levell as may (if practicable) procure a commission of sewers for the same levell as soon as conveniently may be; and that if it shall be thought necessary they cause a letter or letters to be wrott to our representatives in Parliament desiring their furtherance and assistance in the premises; and likewise that this corporation will disburse their proportion of ye expense and charges in obtaining a commission, or further as shall be agreed upon by the maior and jurats for the time being."

It is to be presumed that the corporation succeeded in their

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desire, for in the 7th of Anne, 1709, the Queen issued a commission, which is really at once the foundation and the limit of the defendants' jurisdiction, unless that jurisdiction has been extended by the operation of any later commission. The important words in the commission of Queen Anne are as follows: "Know ye that fforasmuch as the walls, ditches, banks, gutters, sewers, gates, calcies, bridges, streams, and other defences by the coasts of the sea and marsh grounds lyeing and being on the south-east side of the Towne and Port of New Romney, abutting to a certain wall there leading from lands called Butfield Lands to a gate called Sextry Gate, and to the highway leading from the said gate to the sea wall south-west and to another wall there called Seawall, leading from the said highway to a warren called Romney Warren, and to the same warren south and east, and to the highway leading from the said Towne of Romney to Danchurch north and north east, all which lands are lyeing within the Parish of New Romney and Liberty of the said Towne and Port in the county of Kent or in the borders or confines of the same, by the rage of the sea flowing, &c." I may observe that I have no doubt that "the borders and confines of the same" mean the borders and confines of New Romney, not of the county of Kent.

Evidence was given to shew that the boundaries which I have read can with fair amount of certainty be traced; and, as far as I can judge, they are the same as the boundaries of the two later commissions—of paramount importance in this case—the commission of William IV. in 1832, and the commission of the present Queen in 1852; nor, indeed, was this much contested by Mr. Jelf on behalf of the defendants.

The map, however, taken by Mr. T. Woollett in 1832, as it is contended, under the authority of the commission of William IV., ascertains the metes and bounds of the level of New Romney, and by consequence the local limits of the jurisdiction of the commissioners of that level. Something probably was done under the authority of Queen Anne's commission, but nothing which is of importance to the determination of the question before me has been proved on either side.

Queen Anne's commission is important as creating the level and for the first time appointing commissioners; but the question

has really to be determined by documents respectively 120 and 140 years later. In the year 1832 and in the year 1852 William IV. and her present Majesty issued commissions which as regards metes and bounds are, not indeed verbally, but in my opinion in fact and substance, identical. This will appear plain enough by reading them together. The words of the commission of 1832 run thus: "Know ye that forasmuch as the walls, ditches, banks, gutters, sewers, gates, calcies, bridges, streams, and other defences by the coast of the sea and marsh grounds lying and being within the limits of marsh lands lying and being within the level of New Romney, in the county of Kent, extending from a certain point of land called Jefferstone Outlands towards the east to certain outlands called the Saxon or Sextry Salts, bounding and abutting by posts and rails towards the south-west and north, or on the borders or confines of the same by rage of the sea flowing and reflowing, &c." The commission of 1852 is in precisely the same terms, with this exception, that it describes the "marsh grounds" as "lying and being within the limits *of the level of the* marsh lands lying and being within the level of New Romney, &c." The words inserted "of the level of the" seem, if I might indulge in conjecture, to have been inserted by mistake. I can give them no sense, none certainly altering the metes and bounds of the commission of 1832; and as there had been, as far as I know, no fresh petition between 1832 and 1852, and as it is extremely improbable that any change would have been made without some such reason, I arrive without difficulty at the conclusion that the local limits assigned to the jurisdiction of the commissioners are in both commissions substantially the same.

Now, what are those limits? They have been ascertained, I think, by Mr. Woollett's map, and for the reasons which I proceed to state.

Under the authority of the commission of 1832, an inquisition was held in May of that year by jurors duly sworn, and their return was made in due form of law to the commissioners and magistrates empowered under the commission to receive it. They present, among other things, "That all the marsh lands and grounds comprised and enumerated in the schedule hereunder

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written (which said schedule the said jurors make part of this their presentment) are situate lying and being in the said level of New Romney within the liberty of the Cinque Ports, and are particularly delineated in the map of and belonging to the same level." They also present "That all the owners and occupiers of all the marsh lands and grounds comprised and enumerated in the said schedule hereunder written have been of old time accustomed, and ought to be, and shall be taxed, assessed, and charged by the acre, rood, and perch, for and towards the repairing, amending, cutting, &c." And they further present "That all other marsh lands and grounds in the said level which receive benefit or avoid damage by or from the said gut or sluice, banks, &c.," "and are not come to the knowledge of the said jurors, or are accidentally omitted or left out of the said schedule hereunder written (if there be any such), are chargeable, and ought to be, and shall be taxed, assessed, and charged in the manner and proportions aforesaid for and towards the repairs aforesaid."

Now, these passages are very important and all but conclusive, but it may possibly be said they are not absolutely conclusive, because they do not contain negative and exclusive words, and do not say in terms that nothing besides the lands in the schedule is included in the New Romney level. It is true they do not; though, as the lands now scotted do not appear in the schedule, the inference is almost irresistible that none but those lands which do so appear were then deemed liable to scot or rate. But the last presentment is even yet stronger, and does appear to me conclusive of the case. It is as follows: "And the said jurors upon their oaths further present and say that the map now produced and marked with the letters N. R. L., and subscribed by William Brissenden, the foreman of the said jurors, contains a true and just description of all lands, grounds, water mills, houses, buildings, or tenements within the said level, and is and shall be taken as the map of the said level, and evidence of the boundary, extent, and contents of the same level."

Now, none of the lands and tenements in dispute in this action are within the limits of the level of New Romney as delineated in Woollett's map. Mr. Woollett is described as a

man of ability and character, a competent surveyor, and thoroughly acquainted with the level which he was commissioned to delineate. His map is made part of the return of the inquisition; it is authenticated by the jury themselves; it was manifestly intended to ascertain and to put beyond dispute the limits of the level until those limits were altered by proper authority, i.e., by a fresh commission from the Crown. There has been no fresh commission since 1852; the commission of 1852 did not alter the limits ascertained in 1832; they remain, therefore, what they were in that year, and as ascertained by the return to the inquisition with which I have been dealing. It is true that the presentment as to Mr. Woollett's map is not to be found in the inquisition held under the authority of the commission of 1852. But Mr. Woollett was himself the foreman of the jury in that inquisition, and he signs the presentment as foreman; and Mr. Walker, who was present and acted as chairman of the commissioners, tells us that Mr. Woollett's map was placed before the jury in 1852, that no other map was ever produced, and that, as far as his long experience has gone, no part of New Romney outside the boundaries of Mr. Woollett's map has ever been scotted till the proceedings which have given rise to this action. This last piece of evidence, which really is not disputed, seems to me of the greatest weight. Mr. Woollett's map has been practically acquiesced in for a period of nearly sixty years. I am therefore of opinion—and if it is for me to find, I do so find—that Mr. Woollett's map ascertains what have been for at least sixty years, and what still are, the boundaries of the level of New Romney, that consequently the defendants have acted without jurisdiction, and that the plaintiffs are entitled to succeed on the three heads of their claim.

The view which I have taken makes it unnecessary for me to discuss the cases of *Soady* v. *Wilson* (1) and *Hedley* v. *Bates*. (2) Both these cases bind me, both appear to me to have been rightly decided, and I should have acted upon their authority if it had been necessary to rely upon them.

Before expressing my judgment in formal terms I will very briefly notice, though it is perhaps not necessary, some of the

(1) 3 A. & E. 248. (2) 13 Ch. D. 498.

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points which were discussed before me at considerable length and with much energy. I desire to acquit entirely (if my opinion is wished for) the defendants of anything like unfair or discreditable or even unselfish conduct. Perhaps they have been a little high-handed and overbearing, but I am quite satisfied they acted from a sense of public duty, from a sincere desire to benefit the town and its surroundings, and from a strong belief that what they were doing was reasonably necessary for its safety.

I feel constrained to decide against them on principles of law, but I am anxious not to say nor to suggest anything in the slightest degree inconsistent with the purity of their motives or the integrity of their character.

If it were for me, as I think it is not, to determine upon the danger to the town and its surroundings from the probable inroads of the sea, I should hesitate long before I found in the affirmative. Much evidence has been given on this point—very competent evidence, and very conflicting evidence. It would be absurd in me in the face of such evidence, and having seen the country only once, to express a confident opinion. I saw it in July, when the tides were neap and the air was calm, and I well know how very different is the aspect of an angry sea when the tides are high and under stress of tempest. But the sight of the place and common knowledge point out two things. The town of New Romney is built upon an elevation, slight indeed in itself, but appreciable and even considerable when the surrounding country is looked at. Further, the town of New Romney has occupied its present site for many centuries; the church has been in its present position, as it architecture shews, certainly from the 12th, probably from the 11th, century, or even still further back. From the map in Professor Burrows' book upon the Cinque Ports, which I understand may be entirely relied upon, it appears that, from the time of the Romans to the present hour, there has been a process on the whole steadily going on of the conversion of the marshes into dry land, and of the filling up and obliteration of the streams and rivers, and of the change of the Cinque Ports from seaports to inland towns. I remain unconvinced of the suggested

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danger to New Romney, and it is not necessary for me to say more.

On the whole I determine as follows: I declare that the defendants are not entitled to levy the scots or rates mentioned in the statement of claim, or any scots or rates on the plaintiffs' property mentioned in the said statement. I declare the defendants' notices to pay the said scots or rates are bad and should be set aside. I grant an injunction restraining the defendants' from levying or attempting to assess or levy any scot or rate upon the plaintiffs' said property, and I give judgment for the plaintiffs, with costs.

Judgment for the plaintiffs.

J. F. C.

The defendants appealed.

1892. May 4. THE COURT OF APPEAL (Lord Esher, M.R., Fry, and Lopes, L.JJ.) affirmed the decision of Lord Coleridge, C.J., on the grounds stated in his judgment.

Appeal dismissed.

Solicitors for plaintiffs: *Tamplin, Tayler, & Joseph, for Davenport, Jones, & Glenister, Hastings.*

Solicitors for defendants: *Kingsford, Dorman & Co.*

W. A.

1892
Feb. 6.

THE QUEEN *v.* JUSTICES OF ANGLESEY.

Licensing Acts—Inn—Licensed Person—Public-house—Renewal of Licence—Notice of Opposition—"Commencement of Annual General Licensing Meeting"—Adjourned Meeting—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42, *sub-s.* 2.

By s. 42, sub-s. 2, of the Licensing Act, 1872, no objection to the renewal of a licence shall be entertained unless written notice of an intention to oppose the renewal has been served on the holder "not less than seven days before the commencement of the general annual licensing meeting."

On August 17, 1891, a licensed victualler was served with a written notice of opposition to the renewal of his licence. The general annual licensing meeting for the petty sessional division was fixed for August 24; but the adjourned licensing meeting for that part of the division in which his house was situate, and at which he would in the ordinary course apply for the renewal of his licence, was fixed for September 18:—

Held, that the notice was served in time, since the adjourned licensing meeting on September 18 was "the general annual licensing meeting" for that part of the division in which the house was situate.

Rule nisi for a mandamus to justices in quarter sessions to hear and determine the appeal of Griffith Henry Williams from the decision of licensing justices.

It appeared from the affidavits that Griffith Henry Williams held a licence for a public-house known as the Belmont Vaults, at Amlwch, in the county of Anglesey. The general annual licensing meeting for the petty sessional division in which Amlwch is situated was fixed to be held at Llanerchymedd on August 24, 1891, and the adjourned meeting for Amlwch at Amlwch on September 18. On August 17, Williams was served by the superintendent of police with a notice of his intention to oppose the renewal of his licence "at the adjourned annual licensing meeting, to be held for the county of Anglesey (2nd division) at Amlwch on the 18th day of September next," on the grounds specified in the notice.

On September 18, Williams appeared before the licensing justices at Amlwch and asked for a renewal of his licence. He contended that the justices had no jurisdiction to hear evidence in support of the opposition, because notice of opposition had not been served upon him "not less than seven days before the com-

mencement of the general annual licensing meeting," as required by s. 42, sub-s. 2, of the Licensing Act, 1872. (1) The justices, however, overruled the objection, and heard evidence both in support of the opposition and on behalf of the applicant; and, after adjourning the case in order that they might inspect the premises, on September 28 refused to renew the licence.

From their decision Williams appealed to quarter sessions, who dismissed the appeal on October 21. He then obtained a rule nisi for a mandamus.

Poland, Q.C., and *Bryn Roberts*, shewed cause against the rule. The notice was served in time. No doubt, "not less than seven days" means that there must be an interval of seven clear days between the service of the notice and the licensing meeting: *In re Railway Sleepers Supply Co.* (2); *Chambers* v. *Smith.* (3) It is admitted, therefore, that the notice would not have been in time for the meeting on August 24. But the adjourned meeting was also a general annual licensing meeting, and was fixed by statute for the convenience of persons applying for renewals (9 Geo. 4, c. 61, s. 3). Notice of the adjourned meeting had been given (9 Geo. 4, c. 61, s. 5), and the applicant knew that his application for the renewal of his licence could only be made at this adjourned meeting. The notice also informed him that the opposition would be made "at the adjourned annual licensing meeting . . . . at Amlwch on September 18." The applicant had, therefore, nearly a month's notice of the intended opposition, and he was prepared on September 18 with evidence to meet it.

(1) By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 42: "Where a licensed person applies for the renewal of his licence . . . .

(2.) "The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given."

(2) 29 Ch. D. 204.

(3) 12 M. & W. 2.

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In the second place, even assuming that the notice was bad, the court of quarter sessions have heard the case on the merits, and they have jurisdiction to grant or refuse a licence. The appeal is a rehearing, and the notice was served more than seven days before the commencement of the quarter sessions: *Reg.* v. *Justices of Sussex.* (1)

J. Paterson, in support of the rule. The court of quarter sessions had no jurisdiction to hear the appeal if the licensing justices could not do so: *Ruddick* v. *Justices of Liverpool.* (2) The Licensing Act, 1872, s. 42, requires seven clear days' notice of opposition "before the commencement of the general annual licensing meeting." That section has not been complied with, and neither the licensing justices nor the court of quarter sessions had any jurisdiction to refuse to renew the licence, or to hear evidence in support of the opposition: *Reg.* v. *Mayor of Monmouth.* (3)

LAWRANCE, J. In this case I am of opinion that the rule must be discharged. I do not think that the justices were wrong in entertaining the objection. Sect. 42, sub-s. 2, of the Licensing Act, 1872, no doubt says that they shall not entertain any objection to the renewal of a licence, or take evidence with respect to it unless written notice of opposition has been served on the holder "not less than seven days before the commencement of the general annual licensing meeting." The question is whether those words refer to the first general annual licensing meeting for the petty sessional division, or whether they may not apply, when there are adjourned meetings held in different parts of the same division, to the commencement of those adjourned meetings. I am not prepared to say that those adjourned meetings which are held for the convenience of the licensed persons of the district are not general annual licensing meetings. But it is said the section speaks of the "commencement" of the general annual licensing meeting. If, however, the adjourned meeting is a general annual licensing meeting, the commencement of the adjourned meeting is the commencement

(1) 4 B. & S. 966. (2) 42 J. P. 406.
(3) Law Rep. 5 Q. B. 251.

of the general licensing meeting. If we were to hold that the notice must be given not less than seven days before the commencement of the first general annual licensing meeting for the division, the result would be that a licensed person, in whose part of the division the adjourned licensing meeting was fixed for the latest possible date, would have a very much longer notice than a person who had to make his application at the first of such meetings. In the present case it is not contended that the applicant suffered any injustice from the notice not having been served seven clear days before August 24. He had more than seven clear days' notice before September 18, and he was ready with his witnesses on that occasion to meet the objection. The point that he takes, therefore, is purely a technical one, and, in my opinion, he is not entitled to succeed. The rule will be discharged.

WRIGHT, J. I am of the same opinion. I think on a reasonable construction of s. 42, sub-s. 2, that where a general annual licensing meeting is fixed to be held by adjournment on certain specified days in different parts of a division, each of such adjourned meetings is a general annual licensing meeting within the meaning of the section, and that notice of opposition to a renewal which would be applied for at an adjourned meeting is in time if it is served seven clear days before the commencement of such meeting. In this case, therefore, the 18th of September was the commencement of the general annual licensing meeting for the part of the division in which the appellant's house was situate, and the notice was served not less than seven days before that date.

I confess that I should have doubted, apart from the decision of *Ruddick* v. *Justices of Liverpool* (1), whether the rule could have gone in such a case to the justices in quarter sessions who had heard the matter on its merits; but that case, if it is correctly reported, decides that it will do so. I think, however, that the licensing justices had jurisdiction to hear the evidence in support of the opposition and to refuse the renewal, and consequently

(1) 42 J. P. 406.

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that the court of quarter sessions had jurisdiction to entertain the appeal from their decision.

Rule discharged.

Solicitors for appellant: *Hamlin, Grammer, & Hamlin, for R. Mostyn Roberts, Carnarvon.*

Solicitor for respondents: *G. Thatcher, for R. Gray, Bangor.*

A. P. P. K.

C. A.

1892

May 3.

[IN THE COURT OF APPEAL.]

CASTLEGATE STEAMSHIP COMPANY, LIMITED *v.* DEMPSEY AND OTHERS.

Ship—Charterparty—Demurrage—Cargo "to be discharged with all dispatch as customary"—Custom for Dock Company to Discharge Cargo—Strike at Port of Discharge—Non-liability of Charterer.

By the terms of a charterparty the cargo was "to be discharged with all dispatch as customary, and ten days on demurrage over and above the said lying days at 6*d.* per nett register ton per day." By the custom of the port of discharge a dock company undertook the work of discharging cargo. By reason of a strike of the dock labourers the discharge of the cargo was delayed for four days:—

Held (reversing the judgment below), that the effect of the charterparty was not to fix any definite time within which the cargo must be discharged, but to provide that it should be discharged with all reasonable dispatch, having regard to the circumstances and the manner of discharging cargo customary at the port of discharge; and therefore that the charterers were not liable to the shipowners in respect of the delay which had occurred in discharging the cargo.

APPEAL from the judgment of Wright, J. (1), who tried the case without a jury.

The action was by shipowners against charterers for damages for delay in discharging cargo.

The facts were as follows: By the charterparty the ship was chartered to load a cargo of deals and sleepers in the Baltic, and to "proceed to Garston and deliver the same as customary on being paid freight &c., ... subject to the regulation of the ports, and weather and ice permitting, and to the navigation being officially declared open, the cargo to be supplied alongside

(1) Ante, p. 54.

as fast as the steamer can take it in, Sundays and legal holidays excepted, and to be discharged with all dispatch as customary, and ten days on demurrage, over and above the said lying days, at 6*d.* per nett register ton per day . . . . vessel to discharge in a dock or berth as ordered by charterers or their agents . . . . The usual custom of the wood trade of each port is to be observed by each party in cases where not specially expressed . . . . the act of God, perils of the sea, fire, barratry of the master and crew, enemies pirates and thieves, arrests and restraints of princes rulers and people, collisions stranding and other accidents of navigation excepted, even where occasioned by negligence default or error in judgment of the pilot master mariners or other servants of the shipowners." By the custom of the port of Garston the dock company there undertake the whole work of discharging cargo, both the share of the work which ordinarily falls on the shipowners and that which ordinarily falls on the charterers. By reason of a strike of the dock labourers at Garston the discharge of the cargo was delayed to the extent of four days. The learned judge gave judgment for the plaintiffs for 114*l.* 2*s.* damages for the four days' delay.

Kennedy, Q.C., and *Joseph Walton*, for the defendants. According to the cases, where a definite time for discharging the cargo is fixed by the charterparty, the charterer is bound absolutely to discharge it in that time, and takes the risk of anything happening to prevent his doing so. But where a definite time is not fixed, he has only to use reasonable dispatch, and, if he is not in default, the shipowner must bear the loss. Here no definite time is fixed for discharging the cargo. It is to be discharged with all dispatch—which must mean all reasonable dispatch—and in the manner customary at the port of discharge. If that be the true construction of the charterparty, it is not suggested that there was anything in the nature of default by the charterers. Therefore, the whole question is as to the construction of the charterparty. The words "as customary" only refer to the manner of discharge, and cannot be construed as defining the time, though of course the practice of the port with regard to the manner of discharging cargoes would affect the question what would be

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reasonable dispatch. The learned judge below held that the words "as customary" must be referred to the word "dispatch" and treated as defining the time for discharge of the cargo; and he speaks of three forms of charterparty. It is submitted that the cases only recognise two forms, viz., one in which the time is fixed, either by specifying it or giving some measure by which it can be definitely ascertained, e.g., at the rate of so many tons per day; the other, in which the time is undefined. The words "as customary" cannot be regarded as fixing a definite time, because it would practically be impossible to arrive at an average customary rate of speed for unloading cargoes. The time would differ according to the character of different cargoes and the different construction of ships. In *Postlethwaite* v. *Freeland* (1) the words were almost identical with those here in question; and the House of Lords held that the words "according to the custom of the port" did not define the time for unloading. It is said by the learned judge below that the impediment here in question—viz., the strike—was extraneous to the custom of the port, and could not be considered in estimating whether all dispatch as customary had been used; but it is difficult to understand how that can be said to be so. The custom of the port was that the dock company discharged cargoes by their servants, and a strike of dock labourers was the cause of the delay. The provision as to demurrage which follows the words in question means demurrage, not in the proper sense of the term, but in the looser secondary sense of damages for delay. [They also cited *Hick* v. *Rodocanachi* (2); *Nelson* v. *Dahl* (3); *Dunlop & Sons* v. *Balfour, Williamson & Co.* (4); *Lockhart* v. *Falk* (5); *Good & Co.* v. *Isaacs & Sons.* (6)]

Barnes, Q.C., and *W. Pickford*, for the plaintiffs. The true construction of the charterparty, having regard to the collocation of the words and the context, is that by the expression "with all dispatch as customary" it was intended to define the time to be taken in unloading as being the time which it would take at the rate of speed customary in the port of discharge when all dispatch

(1) 5 App. Cas. 599.
(2) [1891] 2 Q. B. 626.
(3) 12 Ch. D. 568.
(4) [1892] 1 Q. B. 507.
(5) Law Rep. 10 Ex. 132.
(6) W. N. (1892) 64.

was used. It is contended that it would not in practice be so very difficult as alleged to estimate such rate of speed. The defendants' construction makes the words useless, because it has already been provided by an earlier clause that the cargo shall be delivered "as customary," i.e., in the customary manner. The meaning is, that the cargo is to be unloaded with all customary dispatch. The charterparty fixes a definite time within the meaning of the decisions if it gives a time which is to be computed by a given standard. The words "as customary" fix as the standard the rate of discharge customary at the port under ordinary circumstances. Extraordinary circumstances, or impediments to unloading extraneous to the custom, such as a strike, cannot be taken into consideration in fixing the time which is customary. The subsequent clause as to demurrage days "over and above the said lying days" shews that the parties intended to fix a definite time by the previous words. *Postlethwaite* v. *Freeland* (1) is distinguishable from the present case on the ground that there were no such provisions there in the context shewing that the intention was to fix a definite time as there are in this case. In *Postlethwaite* v. *Freeland* (1) the impediment to unloading arose out of the ordinary circumstances and practice of the port, and through the ordinary exigencies of business there. The custom there was for the ships to have the use of the appliances for unloading in turn; and, where the appliances of the port have been used as soon as possible according to the practice, there the dispatch has been as customary. A strike is not an ordinary incident of the practice of the port; it suspends it altogether.

[LORD ESHER, M.R. In this case the dock company undertook to do the share of the work of discharging the cargo that would ordinarily fall on the shipowners as well as that which would ordinarily fall on the charterers. The strike prevented that being done which would ordinarily be a condition precedent to the charterer's obligation.]

The question is whether the charterers have not taken on themselves the risk of the dock company's being unable to perform their undertaking; and that really depends on the question

(1) 5 App. Cas. 599.

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whether, on the true construction of it, the charterparty fixes a definite time for discharging the cargo. [They also cited *Ford* v. *Cotesworth.* (1)]

Kennedy, Q.C., for the defendants, was not called on to reply.

LORD ESHER, M.R. I agree that this case turns entirely on the true construction of this charterparty; and that, if according to that construction there is a definite time fixed either expressly or by necessary implication within which the discharge of the cargo is to take place, the charterers are bound thereby, and must pay damages if the ship for any reason is detained for the discharge of cargo beyond that time. The question, therefore, is whether the charterparty fixes a definite time. If the case depended solely on the words "to be discharged with all dispatch as customary," I should say that the meaning of words such as these, taken by themselves, had been determined by case after case. The principal case now on the subject is *Postlethwaite* v. *Freeland* (2) in the House of Lords. In that case the words were "to be discharged with all dispatch according to the custom of the port." The expression "as customary," if expanded, must mean the same as "according to the custom of the port"; and, therefore, it seems to me that the terms used in the two charterparties are exactly equivalent. Therefore, unless the present case can be distinguished as regards the construction of these terms by reference to the other terms of the charterparty, it follows that the words "as customary" refer to the manner and not to the time of discharge. Two matters were relied upon as shewing that the words in this charterparty ought not to be construed as the words in the charterparty in *Postlethwaite* v. *Freeland* (2) were construed. The first of these was the clause as to demurrage days "over and above the said lying days," which follows the words in question, and which was relied on as shewing that the charterparty fixed a definite time for discharging the cargo. It has often been held that there cannot be demurrage days in the proper sense of the term, unless there is a fixed number of preceding lay days. In this charterparty there are no lay days properly so called; there is no fixed

(1) Law Rep. 4 Q. B. 127; Law Rep. 5 Q. B. 544. (2) 5 App. Cas. 599.

number of lay days. So we must construe the charterparty as meaning that the demurrage specified is to commence after the time when the cargo ought to be discharged as customary if all dispatch were used. The second matter relied on by the plaintiffs as distinguishing this case from *Postlethwaite* v. *Freeland* (1) was the previous provision in the charterparty that the ship, after loading a cargo, should proceed to Garston "and deliver the same as customary." It was contended that the same words "as customary," when used in the later part of the charterparty, must receive a different construction from that which they must receive when used in the earlier part of the charterparty. I cannot see why that should be so. The case of *Postlethwaite* v. *Freeland* (1) seems to me to shew that this charterparty does not fix a definite time for discharging the cargo. I adhere to the view which I expressed in the case of *Postlethwaite* v. *Freeland* (2) in the Court of Appeal, and which appears to have been affirmed by the House of Lords. I said with regard to the clause in the charterparty there in question: "To me this clause seems to mean that the ship was to be discharged with all such dispatch as was consistent with the manner and process wherewith every vessel going to that port is discharged." Therefore, the result is that this charterparty fixes no definite time for discharging the cargo. That being so, there are decisions which hold that, where that is the case, the cargo must be discharged within a reasonable time under the circumstances. It was contended by the plaintiffs' counsel that the only circumstances which could be considered were those which were the ordinary result of the ship's being discharged according to the custom of the port, and that extraneous circumstances could not be regarded. The cases seem to me to shew that regard must be had to the actual circumstances under which the discharge of the cargo took place. But, if the circumstances to be regarded must be only those which arise out of the application of the custom of the port, then I think that the circumstance here in question did so arise. The custom of the port was that the ship should be discharged by the dock company, they undertaking by their servants to do what the

(1) 5 App. Cas. 599. (2) 4 Ex. D. 155.

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shipowners and charterers otherwise would respectively have to do as their share of the work. The men employed by the dock company strike. That strike is a circumstance which arises out of the application of the custom of the port. It is, therefore, by reason of the custom that the delay occurred. Either way, therefore, the result is that the discharge took place with reasonable dispatch under the circumstances, and the defendants are not liable for breach of the charterparty with regard to such discharge. The case of *Good & Co.* v. *Isaacs & Sons* (1) appears to me to agree exactly with the case of *Postlethwaite* v. *Freeland* (2), and to shew what construction is to be put on that decision. There the ship was to be discharged "at usual fruit berth as fast as steamer can deliver as customary." It was held that the true construction of the words was that the obligation to unload did not commence until she was berthed in a usual berth; and, when she was so berthed, she was to be discharged as fast as the steamer could deliver in the customary manner. The present case appears to me to be in one respect a stronger case than either *Postlethwaite* v. *Freeland* (2) or *Good & Co.* v. *Isaacs & Sons.* (1) In the ordinary course the discharging of cargo is the joint act of the shipowners and charterers. The shipowners would do their part of the work by the crew. By virtue of the custom which applies to the shipowners as well as the charterers, the dock company are put in the position of both parties, and are to do by their servants the shipowners' as well as the charterers' part of the work. By reason of the very same cause, viz., the strike of the dock labourers, the share of the work for which the shipowners would ordinarily be responsible was prevented from being done, as well as the share of the work for which the charterers would be responsible. It seems to me impossible, under these circumstances, in the case of a charterparty which fixes no definite time, to say that the charterers are to bear the whole burden of what happened. If the shipowners had had to do their part of the work by their own people the result might have been the same; but the case is stronger where the shipowners' part of the work has to be done by the same people as have to do the charterers' part of the work, and the strike

(1) W. N. (1892) 64. (2) 5 App. Cas. 599.

prevents both parts of the work from being done. For these reasons, I am unable to agree with the decision of the learned judge below, and I think that this appeal must be allowed.

FRY, L.J. I agree. The question arises on the construction of a few words of the charterparty. They are as follows, viz., "to be discharged with all dispatch as customary." It has been held in *Dunlop & Sons* v. *Balfour, Williamson & Co.* (1) and in other cases that the words "as customary" in such expressions as this are equivalent to "in the customary manner." They, therefore, primarily refer to manner of discharge, and secondarily only to time. They are not entirely disconnected with time, because the dispatch is to be in the customary manner, and that manner may be one which expedites or delays the discharge of the cargo. I read the words as meaning that the cargo is "to be discharged in the customary manner and with all reasonable dispatch"—that is to say, all dispatch which is reasonable having regard to the actual circumstances of the case, the custom of the port being one of such circumstances. I think that would be the correct view of the meaning of the words if unconnected with or unqualified by other words. That view appears to me to be in accordance with the decision of the House of Lords in *Postlethwaite* v. *Freeland.* (2) But it is said that that decision does not apply to the present case, and that the words here in question must be taken to define the time within which the cargo is to be discharged by some standard, because in an earlier part of the charterparty there is a stipulation for delivery of the cargo "as customary." It is said that these words ought necessarily to have a different meaning when we come to consider them again in a later part of the document. I do not think that a valid argument. I think that primâ facie we should treat the same words as meaning the same thing. Then reliance was placed on the clause which follows the words in question, and which provides for demurrage days "over and above the said lying days." It was argued that "lying days" could only be got by reading the previous words as fixing a definite time for discharging the cargo. I do not agree with this argument. There are not

(1) [1892] 1 Q. B. 507. (2) 5 App. Cas. 599.

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really any lay-days fixed by this charterparty. What is referred to by the words "said lying days" must be the days occupied by the discharge of the cargo with all reasonable dispatch, having regard to the manner customary at the port. Such, I think, is the meaning of the charterparty; and, if so, this is not one of the class of charterparties which by express language or clear implication define the time to be occupied in the discharge of the cargo. When the time is so defined, it is decided by several cases that the charterer is liable if any event happens which prevents the discharge of the cargo within the specified time. That is not the case here. I cannot help observing that the construction we are adopting seems to be the most reasonable construction in the result, having regard to the facts in this particular case. It does not seem to me reasonable to suppose that the charterers intended to take on themselves the liability for the cargo not being discharged within a particular time, although such non-discharge might arise from a circumstance which prevented the doing of the shipowners' share of the work by delivering the cargo at the ship's side—in other words, that they intended to make themselves liable for a delay which affected the shipowners as much as themselves.

LOPES, L.J. I also think that this case entirely depends on the construction of the charterparty. The question really is whether certain words used in the charterparty fix a definite time for discharging the cargo or not. I adhere to what I said in *Budgett* v. *Binnington* (1) as to the difference between cases where a specific time is allowed for loading and unloading and cases where the time is left indefinite. We have to determine here the meaning of the words "to be discharged with all dispatch as customary." I think the expression "as customary" does not refer to time, or, if it refers to time, it is only so far as that is affected by the mode or manner of discharge. It appears to me that the time for discharging the cargo is not defined by these words. The words used in the present case are almost exactly identical with those used in *Postlethwaite* v. *Freeland* (2), which were "to be discharged with all dispatch according to the

(1) [1891] 1 Q. B. 35. (2) 5 App. Cas. 599.

custom of the port." Lord Selborne, L.C., in giving judgment in that case, said: "There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charterparty, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time—that is (as was said by Blackburn, J., in *Ford* v. *Cotesworth* (1)), "a reasonable time under the circumstances." Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified, or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence, ought, I think, to be taken into consideration." Applying those words, what was it which prevented the discharge of the cargo in this case? It was a strike of the dock labourers. By the custom of the port the discharge of the cargo was made by the dock company, so that the impediment to discharge of the cargo arose out of the practice or custom of the port, and therefore comes within the words of Lord Selborne, L.C., which I have cited. It is also to be observed that the custom was for the dock company to do not only what the charterers would ordinarily have to do in discharging the cargo, but also what the shipowners would have to do, viz., to bring the cargo to the side of the vessel. So here the servants of the dock company acted for both parties; and the strike not only prevented the doing of the charterers' part of the work, but also the doing of the shipowners' part of it. Probably it would have

(1) Law Rep. 4 Q. B. 127; Law Rep. 5 Q. B. 544.

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made no difference if it had been otherwise, but it makes the case still stronger. For these reasons, I agree that the judgment must be reversed.

Appeal allowed.

Solicitors for the plaintiffs: *Maples, Teesdale & Co., for Leitch, Dodd, Bramwell, & Bell, North Shields.*

Solicitors for the defendants: *Wynne, Holme, & Wynne, for H. Forshaw & Hawkins, Liverpool.*

E. L.

1891. *Dec.* 8.

BARNES *v.* THE LONDON, EDINBURGH AND GLASGOW LIFE INSURANCE COMPANY.

Insurance (Life)—Policy—Insurable Interest—14 *Geo.* 3, c. 48, *ss.* 1, 3.

In an action to recover the amount of a policy of insurance upon the life of a child, the plaintiff's step-sister, evidence was given of a promise made by the plaintiff to the mother of the child to take care of the child and help to maintain it. No objection was taken on behalf of the defendants that the plaintiff had not in fact incurred any expenditure in respect of the child:—

Held, that the plaintiff had an insurable interest in the child's life, and was entitled, in the absence of any objection as to the amount in fact expended by her, to recover the amount of the policy.

APPEAL from a decision of the judge of the Leeds County Court. The action was brought to recover 21*l.* 10*s.*, the amount of a policy of insurance effected by the plaintiff upon the life of her step-sister. The insurance was effected in November, 1889, when the child was ten years old; the child died in May, 1891. At the trial before the learned county court judge, the plaintiff stated in her evidence that she had promised the child's mother before she died that she would take care of the child, and help to maintain her, and no evidence was called to contradict this statement. It was also stated that after her mother's death the child lived near, but not with, the plaintiff. No objection was taken that the plaintiff had not in fact spent any money upon the child, or as to the amount (if any) expended by her; and the learned judge held that the plaintiff had an insurable interest in the child's life, and was entitled to recover the amount of the policy. Other points, including misrepresentation on the part of the plaintiff as to the state of the child's health and misre-

presentation by the defendants' agent, were taken, and decided in favour of the plaintiff; but it is unnecessary in this report to state the facts upon these points, as the question of insurable interest was the sole question of law raised upon the appeal.

F. Dodd, for the defendants. The plaintiff had no pecuniary interest in the child's life at the time of the insurance, for there was no binding agreement on her part to take care of the child, but at most a voluntary promise to that effect. The interest of the plaintiff in the child's life must be a pecuniary interest: *Halford* v. *Kymer* (1); *Hebdon* v. *West* (2); and there is no evidence that the plaintiff ever expended anything upon the child's maintenance. By 14 Geo. 3, c. 48, s. 3, where the insured has interest in the life, he can recover no greater sum than the amount or value of interest of the insured in the life, which means the amount or value of his interest at the time of effecting the insurance, not at the date of the death.

No counsel appeared on behalf of the plaintiff.

LORD COLERIDGE, C.J. I am of opinion that this appeal must be dismissed. The facts are simple. The person insured was a little girl of ten, and the plaintiff, who effected the insurance for her own benefit, was her step-sister; the child had no mother, though her father was apparently alive; this is, however, not clear upon the evidence. The evidence of the plaintiff was to the effect that she had promised her mother that she would maintain and keep the child; and there was evidence that she had undertaken that burden. That was a duty not cast upon her by law, but was wholly self-imposed; and in carrying out her undertaking the plaintiff might have had to pay for the education and maintenance of the child, possibly also for its burial. In that state of circumstances it is said that the plaintiff had no insurable interest in the child's life. Now, I agree that the insurable interest must be a pecuniary interest, and that the interest must be in existence at the time when the policy is effected; that is perfectly clear upon the authorities. Is there such a pecuniary insurable interest here? I think

(1) 10 B. & C. 724. (2) 3 B. & S. 579.

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Lord Coleridge, C.J.

there is. The expenses to which the plaintiff undertook to put herself for the maintenance of the child were, as I have said, not expenses which she was bound to incur; and in my judgment the plaintiff undoubtedly had an insurable interest in the child's life so far as to secure the repayment of the expenses incurred by her. I cannot find that anything has been said in any case to a contrary effect. Taking the ordinary course of business as the guide to determine the law, I should have thought that it was matter of common knowledge that obligations of this sort were obligations the repayment of which was habitually secured in this way. In my judgment the plaintiff had an insurable interest in the child's life, at least up to the amount of the payments actually made by her on the child's account. No point was taken before the county court as to whether any money had been paid by the plaintiff, or as to the amount, if any, paid by her. The question of amount is, therefore, not before us; and on the point of law we must uphold the judgment of the county court judge.

A. L. SMITH, J. I am of the same opinion. No doubt the contention of the defendants is correct, that unless the plaintiff had a pecuniary interest in the child's life at the time the contract of insurance was made, the policy would be void under the provisions of the statute. I think, however, that the plaintiff had such an interest. A man can insure the life of his debtor. For instance, suppose an agreement by a debtor to pay his creditor 1000*l.* by successive monthly instalments of 100*l.*, the creditor could insure his debtor's life, and at his death recover in an action on the policy against the insurance company. In the present case there is sufficient evidence of an undertaking on the plaintiff's part to incur expense in maintaining, bringing up, and perhaps in burying the child. This decision does not trench on the cases in which it has been held that a father has no insurable interest in the life of his son. There is an obligation in law on a father to maintain his son; there is no such obligation here, but an undertaking to incur expense; and I can see no reason why the plaintiff, having incurred and incurring such expense, has not a pecuniary insurable interest to the extent of each sum

of money as it was successively expended by her for the child's benefit—of course, so long as the total amount does not exceed the amount of the policy. We have nothing to do with the question of amount expended, which point was not taken below; the sole point is whether the plaintiff had any pecuniary interest at the date of the policy, and of that there was evidence. The appeal must be dismissed.

Appeal dismissed.

Solicitors for defendants: *Wynne-Baxter & Keeble.*

W. J. B.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* JUSTICES OF SURREY.

Highway—Diversion—Affixing of Notices—End of Highway—Highway Act, 1835 (5 & 6 *Wm.* 4, *c.* 50), *s.* 85.

By s. 85 of the Highway Act, 1835, which deals with proceedings for the diversion of highways, it is provided that certain notices shall be affixed "at the place and by the side of each end of the said highway from whence the same is proposed to be . . . diverted":—

Held, affirming the judgment of the Queen's Bench Division, that by the expression "end of the highway" is meant the end of the portion proposed to be diverted.

APPEAL from a judgment of the Queen's Bench Division. (1)

The application was for a mandamus to justices directing them to order a certificate relating to the diversion of a highway to be enrolled. The principal objection to the certificate and that on which the justices acted, was that the notices required by s. 85 of the Highway Act, 1835, had not been properly posted. On this point the evidence was that there was a highway connecting two parallel main roads, one leading from Pitland Street to Abinger, the other from Leith Hill to Wootton. It commenced at a point D in the Abinger Road, passed through a point A, and terminated at a point B, in the Wootton Road. It was proposed to divert the highway by stopping up the portion between A and B, and substituting in lieu thereof a new highway between A and a point C in the Wootton Road. The

(1) Ante, p. 633.

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portion of the road between A and B was wholly in the parish of Abinger, while the greater part of that which lay between A and D was in the parish of Holmbury St. Mary. The notices were affixed at the points A, B, and C, and also on the door of Abinger Church, but not at the point D nor on the door of the church of Holmbury St. Mary. Two justices certified that the proposed new highway from A to C was nearer and more commodious to the public than that from A to B, and for this they gave their reasons from which it appeared that the new highway was, in fact, longer than that proposed to be stopped; but it was said to be more convenient and an improvement on the old highway which was in bad repair. In the various notices throughout the proceedings, and also in the certificate, the portion proposed to be diverted was spoken of as portion of a "highway or bridleway and footpath."

The Court of Quarter Sessions refused to enrol the certificate on the ground that notices ought to have been affixed at the point D and on the church door at Holmbury St. Mary.

The Divisional Court made the order absolute for a mandamus. (1)

The justices appealed.

Avory, in support of the appeal. The highway to be diverted is that which lies between the two main roads. The notices are, by s. 85 of the Highway Act, 1835, to be affixed "at the place and by the side of each end of the said highway from whence the same is proposed to be diverted;" that is, there is to be a notice at the place of diversion and at the ends of the highway. The Act does not deal with turnpike roads, but only with small highways with definite limits, and the object is that every one interested in the preservation of the highway should have the opportunity of seeing the notices: *Reg.* v. *Justices of Surrey*. (2) A notice at the point A would give no warning to persons passing along the main road at D, nor was there any notice on the church door of the parish in which the point D is situated to warn persons interested. The second objection is that the description is not accurate. A cartway is claimed over the old highway,

(1) Ante, p. 633. (2) Law Rep. 5 Q. B. 466, per Blackburn, J., at p. 471.

but is not dealt with in the notices or the certificate. Litigation may arise on this, and the Court should not in its discretion grant a mandamus. The justices have to state how much nearer the new road is, whereas they state that it is longer. The question of nearness refers to the old points of departure, and the justices were in error in certifying that the new road was nearer. This should be sufficient to invalidate their certificate, which is further bad, because to describe a road as more convenient is not to give a reason, but merely to say in other words that it is more commodious, and as the parish are bound to keep the old road in repair, a statement that it is at present out of repair does not shew that the new one is more commodious.

R. M. Bray, contrà. The question of where the notices are to be placed must be the same in diverting as in stopping up, and as to the latter it is clear that the ends of the highway to be closed are where the notices should be placed. The statute deals with stopping up a "highway," and the notices and certificate have done the same, and the highway will be diverted and another substituted with the same extent of user. The justices have certified that the new road is more commodious, and their reasons are relevant to that finding.

Avory, in reply.

LORD ESHER, M.R. The question is whether any of the objections to the enrolment of the certificate should be upheld. The first objection is that the notices were insufficient because no notice was posted at the point D. What was sought to be done was to divert the road at the point A. The expression "divert" applied to a road suggests the giving of another road instead of the existing one, as a substitute for and to put an end to it. If that is true, what was about to be done had nothing to do with the road between A and D, but with the shutting up of the road between A and B, and putting in its place as an equivalent the road between A and C. Then the places at which notices should be put are those two, A and B, and I should say they ought also to be placed at C. I entirely agree on this point with the reasons given by Cave, J., and have no doubt that the notices were rightly posted.

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JUSTICES OF
SURREY.

Then a point has been raised as to the reasons given by the justices for diverting the road, which are said to be bad on the face of them. But, so far as I can see, the road was diverted on the ground that it would be more commodious, and the reasons given are sufficient to support that.

Lord Esher, M.R.

Then a difficulty has been raised that in the notices and the certificate the road has been called a bridleway and footpath, and not a cartway. But it is also called a highway, and as such has been dealt with. The old highway, whatever it is, is shut up, and there is given in its place a new highway, which is, in fact, a cartway or wheelway, as well as a bridleway and footway, and I do not think that the difficulties that have been suggested can arise. The mandamus was therefore rightly directed to the justices, and the appeal must be dismissed.

FRY, L.J. The first point argued was that the notices for diverting this road were not properly posted, and that question turns upon the meaning of the words used in the Highway Act, 1835. It is true the 85th section is not so lucidly drawn as it might be, but it appears to me that the words "at the place" are governed by the words "from whence the same is proposed to be turned," just as much as are the words "by the side of each end of the said highway," and that the latter words are introduced for the purpose of indicating that the notices are to be put up not in but by the side of the highway. The places indicated by the two expressions are the same, namely, the two ends of the portion to be diverted, and notices must be put up there. That has been done in the present case and the statute is satisfied. Another point was that the reasons given by the justices were bad on their face. It may be that if they were directed only to the question whether the diversion made the road "nearer," that might be so, but they are sufficient to support the finding that the alteration will be more commodious.

Then it is said that there is an error in the description of the highway which avoids the notice, or if it does not do that, should affect the discretion of the Court as to granting a mandamus. The statute deals with the closing of highways generally and does not deal with the question of one or other species of highway.

Sect. 84 contemplates the partial stopping up of a highway, reserving a bridleway or footway along the whole or any part thereof, but there is nothing in the statute which authorizes the stopping up of the highway so far as it is a bridleway or footway, and the reservation of a wheelway. The application in this case was to shut up the highway, and that is what the justices have done in the operative part of their certificate. If it is said that the effect is to shut up this road as a bridleway and leave it open as a cartway, the answer is that there is no such power in the Act, and that the order of the justices closing the highway closes it for all intents and purposes.

LOPES, L.J. I entertain no doubt that the notices were properly posted at each end of the road with which the certificate was intended to deal, that is the road between A and B and that the objection that there was no notice at D is untenable.

On the objection that the road is wrongly described in the notices and certificate, it is to be observed that it is described as a highway and the only reasonable interpretation of the order is that it would close that road in every respect as a highway.

The magistrates are bound to set out in their certificate how much nearer the proposed new highway is, if it is nearer, and if more commodious, the reasons why it is so. Whether the reasons they have given are all good ones or would support a conclusion as to the nearness of the new highway, they are certainly not insufficient to support a finding as to its being more commodious than the old, and this objection also fails.

Appeal dismissed.

Solicitors for prosecutor: *E. R. Keele, for Down, Scott, & Down, Dorking.*

Solicitors for justices: *E. W. & R. Oliver.*

A. M.

1892
Jan. 22, 25, 26.

In re ASHBY. Ex Parte WREFORD.

Bankruptcy — Fraudulent Conveyance — Joint Power of Appointment — Resettlement—Limitation for Life—Gift over on Bankruptcy—Trust to pay Debts—Revocable Mandate—Bankruptcy of Tenant for Life.

By a settlement made in 1873, real estates were limited to such uses and for such trusts as A. and B. should by deed jointly appoint, with remainder, in default of appointment, to A. for life, with remainder to B. for life, with remainders over. The property settled was not B.'s property, and he was not a party to the deed. By a resettlement, made in 1888, A. and B., in exercise of their joint power of appointment under the deed of 1873, appointed the same estates to trustees for a term of years to raise by way of mortgage certain sums of money to pay (inter alia) the private debts of B., which were scheduled to the deed, with remainder to the trustees during the life of B. to permit him to receive the income until he should become bankrupt, with a discretionary trust over, in the happening of that event, for the benefit of B., his wife and children or relatives, with remainders over. The trustees raised the money, and had in March, 1889, paid some of the debts, when they received a written notice from B. not to pay any more. In 1889 B. was adjudicated bankrupt, and in 1890 A. died:—

Held, first, that the deed of 1888 was not a settlement by B. of his own property on himself, and that the discretionary trust over was valid, and took effect;

Secondly, that the trust to pay debts was a revocable mandate which had been duly revoked, and that the trustee in bankruptcy was entitled to the balance in the hands of the trustees of the settlement.

Semble, that if the trustees of the settlement, under their discretionary trust, paid B. more than sufficient for his necessary maintenance, he could be made to account for the excess to his trustee in bankruptcy.

Motion by the official receiver, as trustee in the bankruptcy of G. Ashby, for the purpose (inter alia) of impeaching a proviso in a settlement made in April, 1888.

By indenture of settlement dated January 17, 1873, and made between N. Ashby and Anne, his wife, of the first part, T. Miles and J. Addison of the second part, R. M. Fawcett and E. J. Selwyn of the third part, and T. Moore and B. Foster of the fourth part, certain real estates were limited to such uses, upon such trusts, and generally in such manner in all respects, as N. Ashby and Anne his wife should by deed jointly appoint; and in default of appointment to certain uses limiting a rent-charge in favour of the said Anne Ashby during the joint lives of herself and N. Ashby, and after the death of either of them a similar rent-

charge in favour of George Ashby (the son of N. Ashby) during the joint lives of himself and the survivor of them, the said N. Ashby and Anne his wife, with remainder to the use of N. Ashby for life, with remainder to the use of Anne Ashby for life, with remainder to the use of trustees for raising portions for the younger children of Anne Ashby (which did not take effect), with remainder (in the events which happened) to such uses as N. Ashby and George Ashby should at any time during their joint lives by deed jointly appoint, with remainder in default of such appointment to the use of the said George Ashby for life, with divers remainders over.

The said Anne Ashby died on June 30, 1886.

By an indenture of resettlement, dated April 26, 1888 (being part of a family arrangement executed by the direction and with the sanction of the High Court), and made between the said N. Ashby of the first part, the said George Ashby of the second part, V. Green and W. V. Hardwick (as trustees) of the third part, it was witnessed that the said N. Ashby and George Ashby, in exercise of the joint power of appointment given to them by the said settlement of January 17, 1873, did (each as settlor) thereby jointly appoint and grant the said real estates to the use of the said V. Green and W. V. Hardwick, their executors, administrators, and assigns, for the term of 1000 years, upon trust to raise by way of mortgage certain sums of money to pay off certain mortgages on the real estate, and (inter alia) the private debts of George Ashby, amounting to 1050*l.*, with remainder to the use of the said N. Ashby for life, with remainder to the use of the said V. Green and W. V. Hardwick, during the life of the said G. Ashby, upon trust to receive the rents and profits of the same premises, and pay the same to the said G. Ashby during his life, with divers remainders over; the ultimate limitation being to the use of G. Ashby in fee simple. And it was thereby declared that the trustees or trustee should pay such rents and profits to the said George Ashby only so long as he should not assign, charge, or incumber, or attempt, or affect to assign, charge, or incumber the same, "or do or suffer anything whereby the same would, through his act or default, or by operation or process of law, or otherwise, if

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hereby made payable to him absolutely, become vested in or payable to any other person"; but if any such assignment or other thing should be made, done, or suffered, then the trustees or trustee should pay and apply such rents and profits during the remainder of the life of the said G. Ashby, not to him, but for the personal maintenance or support of the said G. Ashby and his wife and issue (if any), or his relations, in such manner as the trustees or trustee should in their absolute discretion think fit.

The trustees proceeded to raise the 1050*l.*, and had in March, 1889, paid 329*l.* 18*s.* 3*d.* of the debts, and were about to pay the remaining £719 13*s.* 9*d.*, when they received a written notice from G. Ashby requiring them not to part with any of the moneys in their hands applicable for the payment of such debts.

In July, 1889, G. Ashby was adjudicated bankrupt on a creditor's petition presented in December, 1888, and the official receiver became the trustee in bankruptcy.

The bankrupt, who attained his majority in 1887, was unmarried.

In November, 1890, N. Ashby died.

In March, 1891, the official receiver, as trustee in bankruptcy, served the trustees of the settlement of 1888 with a notice of motion, claiming, first, the life interest of the bankrupt in the settled estates, on the ground that the discretionary trust over on alienation was void as against him; secondly, the sum of 719*l.* 13*s.* 9*d.*, the balance of the 1050*l.* still in their hands, on the ground that it was part of the property of the bankrupt.

Muir Mackenzie, for the official receiver. As to the first point, the law is clear that a settlement by a man of his own property on himself for life, with a gift over on bankruptcy, is void as against his trustee in bankruptcy: *Higinbotham* v. *Holme* (1); *Lester* v. *Garland* (2); *In re Moon* (3); *In re Detmold.* (4) Here, having regard to the interest which G. Ashby took under the settlement of 1873, the deed of 1888 was really a resettlement by him of his own property, his prior life estate, and it therefore falls within the principle of the cases cited. The evident in-

(1) 19 Ves. 88.
(2) 5 Sim. 205.
(3) 17 Q. B. D. 275.
(4) 40 Ch. D. 585.

tention of the deed of 1888 was to prevent subsequent creditors being paid. As to the second point, a trust to pay debts not communicated to creditors is a revocable mandate, even although some creditors may have been paid: *Wallwyn* v. *Coutts* (1); *Synnot* v. *Simpson* (2); *Gibbs* v. *Glamis* (3); *Johns* v. *James* (4); *Cornthwaite* v. *Frith* (5); *Siggers* v. *Evans* (6); *Harland* v. *Binks*. (7) Here no particular creditors were named in the schedule to the deed; there is no evidence that the deed was communicated to any creditor, while there is clear evidence that G. Ashby revoked the trust in March, 1889.

Levett, Q.C., and *Yate Lee*, for the trustees of the settlement. This settlement is good as against the trustee in bankruptcy. In *Higinbotham* v. *Holme* (8) the bankrupt settled his own property; but here the settled property never was George Ashby's own property, and never could be. He had only a joint power of appointment over it with his father, and that was exercised under the sanction of the Court. The discretionary trust over is really for the benefit of the bankrupt's children and relatives: *Montefiore* v. *Behrens* (9); *Holmes* v. *Penney*. (10)

G. Henderson, for creditors whose debts were scheduled to the settlement. Under the circumstances, this trust to pay debts is irrevocable. No doubt it might have been revoked by the father and the son during their joint lives—by both of them, but not by one of them: *Lewin* on Trusts (8th ed. pp. 516, 517.) *Synnot* v. *Simpson* (2) is in point. The son's revocation was futile, and it was given after the commencement of his bankruptcy.

Mellor, for other creditors in the same interest.

Muir Mackenzie, in reply.

Cur. adv. vult.

Jan. 26. VAUGHAN WILLIAMS, J. In my opinion I cannot make the declaration asked for by the trustee in bankruptcy. I am asked to declare that the trustee is entitled to the interest of

(1) 3 Mer. 707.
(2) 5 H. L. C. 121.
(3) 11 Sim. 584.
(4) 8 Ch. D. 744.
(5) 4 De G. & Sm. 552.
(6) 5 E. & B. 367.
(7) 15 Q. B. 713.
(8) 19 Ves. 88.
(9) 35 Beav. 95; Law Rep. 1 Eq. 171.
(10) 3 K. & J. 90.

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George Ashby under the settlement of 1888, notwithstanding the proviso for the determination of that interest on his bankruptcy; and I am asked to make that declaration on the ground that the settlement in question is a settlement by the bankrupt of his own property on himself, and that the defeasance is therefore void as a fraud on the bankruptcy laws. But I am of opinion that the settlement was not a settlement by the bankrupt of his own property on himself within the meaning of the rule of law above referred to. [The learned judge stated the facts above detailed, and continued:—] In my opinion the resettlement of the property in 1888 under the power of appointment was not a settlement by the bankrupt of his own property. It was a settlement of property in which the bankrupt only acquired an interest under the deed of settlement itself, which contained the joint power of appointment—an appointment which the bankrupt could not have made of his own will, but only with the assent of Nicholas Ashby on such terms as to Nicholas Ashby seemed meet. It was said that the bankrupt, by joining in the appointment, was only taking an interest which he already had under the settlement of 1873 in default of appointment. Even if this is so, the estate taken under the power of appointment is, in law, a different estate from that which he took under the settlement of 1873, and it would, in my opinion, be fallacious to say that the property that he took under the power of appointment was his own property before the execution of the power, because prior to the execution of the power he had an equal estate in the same physical property defeasible by the execution of the power. But the fact is that the acceptance of the estate conferred by the power of appointment gave to the bankrupt and to his creditors present and future an estate of much greater value than that which he took under the indenture of 1873 in default of appointment, and the execution of the power was advantageous to all concerned. For these reasons then, in my opinion, the present case does not fall within the rule to which I have alluded. I want, however, before passing from this part of the case, to say one word with regard to the provision in the deed of settlement for a discretionary allowance by the trustees of that settlement for the personal support and maintenance of the bankrupt and

his wife or his relations, and it is this. I am of opinion, having regard to *Holmes* v. *Penney* (1), that although the presence in this settlement of this discretionary power to the trustees does not make the settlement void as against creditors and may practically, to a great extent, give the bankrupt the advantage of the forfeited estate, or the advantages which he would have gained as the owner of the forfeited estate; yet, inasmuch as the advantages can only be gained at the discretion of the trustees, it seems to me on the authority of that case that if the trustees, in the exercise of their discretion, do pay the rents and profits of this estate to the bankrupt to the extent to which sums are paid to the bankrupt in excess of the amount necessary for his mere support, then the trustee in bankruptcy will be able to insist upon the bankrupt accounting to him for the rents and profits so received. And one cannot help feeling glad that such should be the result, because it would be a monstrous thing in this case, in which as I understand there are no children, that, notwithstanding the bankruptcy, the bankrupt, at the discretion of the trustees, should substantially go on receiving the same income from this estate which he was receiving before the bankruptcy. The view that I take of this point renders it unnecessary for me to express any opinion upon a good many of the important questions which were argued, including the question of what is the effect when a deed which otherwise would be fraudulent as against creditors has been executed under the sanction of the Court of Chancery.

The other point I have to deal with is one in which the trustees of the settlement of 1888 are in no wise interested. A sum of money had, according to the terms of that deed, to be raised for, amongst other purposes, paying the debts of Nicholas Ashby, and also the debts of George Ashby which were enumerated in schedules which were attached to the deed, and the only question I have now to determine is, whether I ought to treat the provision for the payment of the debts of George Ashby, in so far as those debts have not been paid, and there is money in hand wherewith to pay them, as a revocable mandate to George Ashby or as an irrevocable provision which gives those creditors

(1) 3 K. & J. 90; 26 L. J. (Ch.) 179.

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the right, notwithstanding the bankruptcy, to have this balance of 719*l.* odd applied to the payment of their debts to the exclusion of the others. I am very clearly of opinion that the provision for the payment of these creditors is a mere revocable mandate. It is quite plain that the creditors, who were not parties to the deed and to whom the deed does not seem in any way to have been communicated, have themselves no interest whatsoever in the matter and no locus standi at all. Sometimes, however, and particularly in the case of the administration of insolvent estates, creditors get preferential payments because it is the only way of doing justice between the bankrupt and other persons; and if in this case there was anything in the deed to shew that the other parties to the deed, or Nicholas Ashby, had an interest in the payment of these debts of George Ashby, why, the mandate might then be irrevocable. But I can find nothing to shew that Nicholas Ashby had the slightest interest in these debts being paid. When I asked what interest it was that Nicholas Ashby had in the payment of these debts, the answer was that if these debts were paid Nicholas Ashby would have had the advantage of having for his heir some one who at some period of time would apparently have been absolutely free from debt. In my opinion, that is an advantage of so shadowy a kind that it cannot for one moment be supposed that George Ashby and Nicholas Ashby had in their minds that any such advantage would accrue to Nicholas Ashby; and under those circumstances I direct that the trustees of that settlement shall hand over the 719*l.* odd to the trustee in bankruptcy to be dealt with as part of the general estate of the bankrupt.

Solicitors for the trustee in bankruptcy: *Clement, Cheese, & Green.*

Solicitors for the settlement trustees: *Routh, Stacey, & Castle.*

Solicitor for the creditors: *J. G. Colham.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1892
March 4.

IN RE DUNCAN. EX PARTE OFFICIAL RECEIVER.

Bankruptcy—Trustee—Employment of Solicitor—Costs—Taxation—Committee of Inspection—Power to limit amount of costs to be incurred—Official receiver acting as trustee—No committee of inspection appointed—Power of Board of Trade to limit costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 22 (9); 54 (1); 57 (3); 73 (3)—*Bankruptcy Rules*, 1886, *rr.* 117, 337.

By s. 57 (3) of the Bankruptcy Act, 1883, the trustee in a bankruptcy may, with the permission of the committee of inspection, employ a solicitor to take any proceeding or do any business which may be sanctioned by the committee.

By s. 73 (3) "All bills and charges of solicitors . . . shall be taxed by the prescribed officer, and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made. The taxing master shall satisfy himself before passing such bills and charges that the employment of such solicitors . . ., in respect of the particular matters out of which such charges arise, has been duly sanctioned."

By s. 22 (9), "If there be no committee of inspection, any . . . permission by this Act . . . required to be . . . given by the committee may be . . . given by the Board of Trade on the application of the trustee."

By s. 54 (1), "Until a trustee is appointed, the official receiver shall be the trustee."

By r. 117 of the Bankruptcy Rules, 1886, "Before taxing the bill or charges of any solicitor . . . employed by an official receiver or trustee, the taxing officer shall require a certificate in writing, signed by the official receiver or trustee, as the case may be, to be produced to him, setting forth whether any, and if so what, special terms of remuneration have been agreed to, and in the case of the bill of costs of a solicitor, a copy of the resolution or other authority sanctioning the employment":—

Held, first, that the committee of inspection, in giving permission to the trustee to employ a solicitor, have power to limit the amount of costs which may be incurred.

Secondly, that when no trustee and no committee of inspection have been appointed by the creditors, and the official receiver, therefore, becomes the trustee in the bankruptcy, the Board of Trade have the power to authorize the employment of a solicitor by the official receiver, and in doing so to limit the amount of costs which may be incurred.

Thirdly, that when the amount of costs to be incurred has been limited, either by the committee of inspection or by the Board of Trade, the taxing-master in taxing the solicitor's bill of costs, cannot allow as against the bankrupt's estate a larger sum than the amount thus limited.

APPLICATION by L. F. Duncan (formerly a bankrupt) to review the taxation of the costs of Messrs. Hatchett-Jones & Co., the

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solicitors who had acted for the official receiver as trustee in the bankruptcy.

On September 8, 1890, a receiving order was made against the debtor, and on September 10 he was adjudged a bankrupt. At the first meeting of the creditors no appointment was made of a trustee or of a committee of inspection, and consequently, by s. 54 (1) of the Bankruptcy Act, 1883, the official receiver became the trustee in the bankruptcy.

On September 16, the official receiver applied to the Board of Trade for authority to employ specified solicitors in conducting the examination of certain persons whom he desired to examine with regard to the property of the bankrupt.

The application was made upon a printed form furnished by the Board of Trade for the purpose. The material parts of the application were as follows :—

"Nature of business for which solicitor is required.	*Examination of certain persons at a private meeting.*
"Terms (if any) as to remuneration.	*Will look to estate for costs.*
"Amount of assets (if any) available for payment of costs.	*At present no assets available.*
"Maximum amount of costs beyond which no expense will be incurred without further application. An estimate should always be given.	*Say 50l.*
"What security (if any) for repayment of costs, or what prospect thereof.	[No answer given.]
"Period during which employment is likely to last.	*Cannot say.*
"Special reasons justifying the application.	*The above-named solicitors act for the petitioning creditor, who is believed to be the only creditor. The bankrupt is absconding.*"

This document was signed by the official receiver. Those parts of it which were printed above in italics were in writing; the remainder of it was printed.

The Board of Trade assented to the application by the following "minute" written at the foot of it, and dated September 17 :—

"Approved on the understanding that Messrs. Hatchett-Jones & Co. (the solicitors) will look to the estate only for costs. No charge to be made against the vote in any event."

By the "vote" was meant a sum voted by Parliament.

On September 30, 1890, the official receiver made another similar application to the Board of Trade for authority to employ a solicitor. In this application the "nature of the business for which solicitor is required" was stated to be "To take steps to obtain possession of property, including proceedings in France."

It was proposed to employ Messrs. Hatchett-Jones & Co.; and it was stated that they would look to the estate for costs, and that no assets were available at present. The "maximum amount of costs beyond which no expense will be incurred without further application" was stated to be 50*l.* It was stated also that "it is believed that considerable assets will be recovered in the course of the proceedings," and the special reason justifying the application was, "It is believed that the bankrupt is now in France, and has a considerable sum of money, and possibly effects, in his possession." This application was assented to by the Board of Trade by a minute expressed in the same terms as the former one.

On November 17, 1890, the official receiver made a third application to the Board of Trade for authority to employ a solicitor, stating the following circumstances: "A motion before Cave, J., to declare that a sum of 1500*l.*, which was paid by the bankrupt to his wife, was only a loan by the bankrupt to his wife, and that the same formed part of the property divisible amongst the creditors of the bankrupt, and for payment by the respondent to the official receiver of the said sum of 1500*l.*" It was proposed to employ Messrs. Hatchett-Jones & Co. The terms of remuneration were to be "taxed costs out of estate." It was stated that the amount of assets available for payment of costs was between 5000*l.* and 6000*l.*, and that the "maximum amount of costs beyond which no further expense will be incurred without further application" was 100*l.* The Board of Trade assented to this application by the following minute: "Approved as a charge against the estate."

On December 12, 1890, the official receiver made a fourth application to the Board of Trade for authority to employ a solicitor, again proposing Messrs. Hatchett-Jones & Co. The

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application stated that the taxed costs were to be paid out of the estate, and that the "maximum amount, &c." was 50*l*. The Board of Trade assented by a minute, "Approved as a charge against the estate."

Ultimately the creditors were paid in full, and on the application of the bankrupt the bankruptcy was annulled. Messrs. Hatchett-Jones & Co. delivered to the official receiver a bill of costs exceeding 500*l*. The bill was referred to the taxing-master for taxation. The bankrupt objected that the utmost amount which could be allowed out of the estate was 250*l*., that being the total of the "maximum amounts" mentioned in the four applications which had been approved by the Board of Trade. The taxing-master overruled the objection, and allowed the costs at 506*l*. 13*s*. 4*d*. The taxing-master said: "I am of opinion that the authority of the Board of Trade for the official receiver to employ a solicitor is a mere departmental document of a private character, which neither the bankrupt nor his solicitor had any right to inspect. Moreover, that Messrs. Hatchett-Jones & Co. had no knowledge of the contents (beyond the fact that it was an authority for them to act), and they cannot be bound by a private arrangement made between the Board of Trade and the official receiver."

1892. January 19. *Sidney Woolf, Q.C.*, and *Ringwood*, for Duncan.

Muir Mackenzie, for the solicitors.

VAUGHAN WILLIAMS, J. I am of opinion that the decision of the taxing-master was wrong, and that these costs ought not to be allowed against the estate to any amount beyond the sums mentioned in the authorities of the Board of Trade sanctioning the employment of the solicitors. I understand rule 117 to mean, that in cases in which no "copy of the resolution or other authority sanctioning the employment" of a solicitor is produced to the taxing officer, he has no jurisdiction to tax the costs.

What, then, is the resolution or authority which ought to be produced? Sect. 57 of the Act says that the trustee may, with the permission of the committee of inspection, "employ a

solicitor to take any proceedings or do any business which may be sanctioned by the committee of inspection." If then in the present case there had been a trustee other than the official receiver, it is not, as I understand, contended that the taxing officer would have had jurisdiction to tax the costs, unless and until the resolution of the committee of inspection authorizing the employment of the solicitors had been produced. If that resolution had been limited in the way in which the documents issued by the Board of Trade were limited, it seems to me that the taxing officer would have been bound to regard that limitation, and could not have allowed any costs in excess of it.

It is said that there is a difference in cases in which the official receiver is the trustee, and it was contended that in such a case rule 117 has really no application, because by virtue of rule 337, "where there is no committee of inspection, any functions of the committee of inspection which devolve on the Board of Trade may, subject to the directions of the board, be exercised by the official receiver." It was said that the official receiver gives himself permission to employ a solicitor, and that therefore rule 117 had no application. I do not assent to that view. *In re Johnstone* (1) was referred to, and, following the judgment in that case, it may very well be that, when there is no committee of inspection, directions given by the Board of Trade would for the purposes of rule 117 stand in lieu of a resolution of the committee of inspection.

What is the effect of the authority given by the Board of Trade? It is said that it was given only for departmental purposes. That may be so. The Board of Trade have adopted the very salutary practice of requiring the official receiver, when he is acting as trustee, to apply to them for permission to employ a solicitor; and when they give their sanction they do so, as it seems to me, subject to the conditions which are implied by the very terms of the application for the permission. These applications are made upon forms supplied by the Board of Trade, and I find that, when they give permission for the employment of a solicitor, they generally take care to give it subject to a condition as to the amount which is to be expended in costs. They

(1) 2 Morr. 206.

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did so in each of the authorities which they gave in the present case. I think that the conditions which appear in those authorities limited the jurisdiction of the taxing master in the matter, and that therefore he ought not to have taxed the bill of costs without regard to those conditions, but should have taxed it subject to those conditions and limitations of amount. He ought not to have allowed against the estate more than 250*l.* in all.

From this decision the official receiver appealed.

March 4. *Sir E. Clarke, S.G.*, and *H. Sutton*, for the official receiver. The costs ought not to have been limited to 250*l.* When the Board of Trade authorize the official receiver as trustee to employ a solicitor, they cannot limit, or at any rate are not bound to limit, the amount of the costs which are to be incurred; the solicitor is entitled to have his fair and proper costs paid out of the bankrupt's estate. The question depends mainly on the construction of s. 54, sub-s. 1 (1), and s. 73, sub-s. 3, of the Bank-

(1) By s. 22, sub-s. 9, of the Act: "If there be no committee of inspection, any act or thing, or any direction or permission by this Act authorized or required to be done or given by the committee, may be done or given by the Board of Trade on the application of the trustee."

By s. 54, sub-s. 1: "Until a trustee is appointed, the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee."

By s. 57: "The trustee may, with the permission of the committee of inspection, do all or any of the following things (inter alia):

(3.) "Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection.

"The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases."

By s. 73, sub-s. 3: "All bills and charges of solicitors, managers, accountants, auctioneers, brokers, and other persons, not being trustees, shall be taxed by the prescribed officer, and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made. The taxing master shall satisfy himself before passing such bills and charges that the employment of such solicitors and other persons, in respect of the particular matters out of which such charges arise, has been duly sanctioned."

By r. 117 of the Bankruptcy Rules, 1886: "Before taxing the bill or

ruptcy Act, 1883, and rule 117 of the Bankruptcy Rules, 1886. No trustee or committee of inspection having been appointed, the official receiver became trustee, and the Board of Trade stood in the position of the committee. The solicitors were not bound by a private arrangement between the Board of Trade and the official receiver limiting the amount of the costs to be incurred. The solicitors knew nothing of this limitation.

[FRY, L.J. The solicitors might possibly have a claim against the official receiver personally for their costs beyond 250*l.*]

The only thing which rule 117 requires to be produced to the taxing master is the authority to employ a solicitor.

The authorities which were given by the Board do not in fact limit the amount of costs, they merely contain a speculative representation or estimate by the official receiver of the probable amount of the costs. This is only for the purpose of guiding the exercise of the discretion of the Board.

French, Q.C., and *Ringwood*, for Duncan. The authorities given by the Board of Trade clearly limit in each case the amount of costs which is to be incurred. The employment of the solicitors must be limited to a particular matter, and there is equal power to limit the costs. If there were a committee of inspection and a trustee appointed by the creditors, the committee, in giving permission to the trustee to employ a solicitor, would have power to limit the costs; and, when the official receiver is trustee, the Board of Trade have that power. The taxation is only between the solicitors and the estate; it does not affect any claim which the solicitors may have against their client, the official receiver, personally.

[They were stopped by the Court.]

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charges of any solicitor, manager, accountant, auctioneer, broker, or other person employed by an official receiver or trustee, the taxing-officer shall require a certificate in writing, signed by the official receiver or trustee, as the case may be, to be produced to him, setting forth whether any, and if so what, special terms of remuneration have been agreed to, and in the case of the bill of costs of a solicitor, a copy of the resolution or other authority sanctioning the employment."

Rule 337: "Where there is no committee of inspection, any functions of the committee of inspection which devolve on the Board of Trade may, subject to the directions of the Board, be exercised by the official receiver."

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IN RE DUNCAN.
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LORD ESHER, M.R. It seems to me that the first point to be considered is, what would be the meaning of s. 57 if there were a committee of inspection and a creditors' trustee? Does that section, upon its true construction, mean that, if the committee of inspection give permission to the trustee to employ a solicitor, they cannot limit the amount to which he may go as regards costs in the employment of that solicitor? I think upon the true construction of that section there is a necessary implication that the committee, if they give permission, may give either a full or a limited permission. Whether, if they were to give an unreasonably full permission they might not be controlled by the Court, is a matter which I need not now discuss. But, in my opinion, the committee may give a limited permission; they would be authorized to say to the trustee, "You may employ a solicitor, but you may only incur costs up to a certain amount."

If that be so with regard to the committee of inspection, what is the position of the Board of Trade when there is no committee of inspection? If a trustee were appointed by the creditors, but no committee of inspection (that is one case), then s. 22 (9) says that "any permission by the Act required to be given by the committee may be given by the Board of Trade on the application of the trustee." It is obvious, as it seems to me, that in that case the Board of Trade would stand precisely in the position of the committee of inspection; they would replace the committee of inspection; they would have the same powers and the same duties. When no committee of inspection and no trustee are appointed by the creditors, then by s. 54 the official receiver stands in the position of the trustee for the time; there is in effect a trustee and no committee of inspection, and the same result follows. The Board of Trade have to exercise the rights and to perform the duties which otherwise would have devolved upon the committee of inspection.

Then reliance was placed on rule 337, which says that, "Where there is no committee of inspection, any functions of the committee of inspection which devolve on the Board of Trade may, subject to the directions of the Board, be exercised by the official receiver." All I can say is that it would be absurd to suppose that the functions of the Board of Trade, being such as I have

described, can be exercised by the official receiver when the question is whether the Board of Trade are or are not to give the official receiver permission to do an act. That would be an absurdity, and it cannot be the meaning of the rule. Even though the Board should give no directions, the official receiver could not give permission to himself. The notion is ridiculous. But the Board of Trade have assumed to give directions to the official receiver, and therefore the point does not really arise.

This being the state of things, it is said that the Board of Trade may give authority to the official receiver to employ a solicitor, but they are not bound to fix the amount of costs which may be incurred; and, if they do not fix the amount, the solicitor whose employment they have authorized may take the reasonable costs of the work which he has reasonably done out of the estate. It is said that the Board have not in the present case limited the official receiver to any particular amount; that, assuming they might have done so, they have not done it. But, to take one of the applications of the official receiver as an example, he says, "I apply for the authority of the Board of Trade to employ a solicitor; the maximum amount of costs beyond which no expense will be incurred without further application 50*l*." What must be the meaning of that to any man who reads it with an unprejudiced mind and with common sense? It must mean, "I apply to you to allow me to employ a solicitor, and to incur costs up to the maximum amount of 50*l*."; that is, not beyond 50*l*. That is the meaning, and the Board assent to that. They have assented by four documents expressed in similar terms, the total of the amounts mentioned being 250*l*. Therefore, they have given their assent to the official receiver employing a solicitor, and incurring costs up to the maximum amount of 250*l*. If his costs are less than 250*l*., of course they will be paid out of the estate; if they are more, they cannot be paid out of the estate, beyond that sum. I agree with Vaughan Williams, J., that the taxing master in taxing the costs, although in form he is taxing them as between the person who has employed the solicitor and the solicitor, is in fact taxing them as between the bankrupt's estate and the solicitor, and his jurisdiction is limited to the amount which the official receiver has been authorized to incur.

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I think, therefore, that the judgment is right, and that the appeal must be dismissed.

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FRY, L.J. For the reasons which have been already given by the Master of the Rolls, I cannot doubt that a committee of inspection may impose a condition upon their permission to the trustee to employ a solicitor, nor can I doubt that the same power is vested in the Board of Trade, and that they stand in the place of a committee of inspection when no committee has been appointed, and instead of a creditors' trustee the official receiver acts as trustee.

Then arises the question whether the Board have in the present case given their permission subject to a condition; and upon that point two arguments have been addressed to us. Four documents have been produced for sums the total of which is 250*l*. It is said, in the first place, that we cannot look at the whole of those documents; they are said to be "departmental" documents, whatever that may mean. But the applicant is in this difficulty. He must either produce the authority of the Board of Trade for the employment of a solicitor, or if he does not, no costs can be allowed. If he does produce it, we must read it to see what it means, whether it is or is not departmental or confidential. It is quite clear that in order to understand what has been done we must read the documents.

Then, when we read the document the second argument arises. It is said, although the document contains that statement with regard to the "maximum amount of costs, beyond which no expense will be incurred without further application," and although the Board's approval of the employment of a solicitor is given upon that representation, yet no condition is imposed. In my judgment, that argument is utterly untenable. The application is made for "authority to employ a solicitor under the following circumstances"; and, in my opinion, that stipulation or promise as to the maximum amount of costs which was accepted by the Board of Trade thereupon became a condition of their consent. I think that is the true meaning of the document. Any other construction of it would, I think, be unreasonable. I have no doubt whatever that the assent given was a conditional

one. It is now sought to depart from the condition. Permission having been obtained to employ a solicitor, at a cost amounting in the whole to 250*l.*, it appears that the official receiver has run up a bill of costs amounting to upwards of 500*l.* If anything can shew the importance of keeping a strict hand upon this kind of employment, this case is a proof of it. I think, therefore, that the decision of Vaughan Williams, J., was right.

Lopes, L.J. The official receiver stands in the position which the trustee would occupy if there were a trustee and a committee of inspection. I cannot for a moment doubt that a committee of inspection would have full power, in giving permission to the trustee to employ a solicitor, to couple that permission with a condition that the costs which he might incur should not exceed a certain sum. Now the Board of Trade, where there is no committee of inspection, occupy the place which a committee of inspection would occupy, and, therefore, they have similar powers, and can give permission to the trustee to employ a solicitor, and in doing so can limit the amount of costs which he may incur. In this case it is clear that the Board of Trade have given permission to employ a solicitor. But it is said that they had no power to limit the amount of costs which the official receiver might incur. I am of opinion that they had such a power, and that they have by the documents which have been produced to us limited that amount to 250*l.* I think, therefore, the taxing master, in taxing the costs as against the estate, is bound by that amount, and cannot allow more than 250*l.* as against the estate. Between the official receiver and the estate, no more than 250*l.* can be allowed.

Appeal dismissed.

Solicitors: *Solicitor to Board of Trade; Leggatt, Rubinstein & Co.*

W. L. C.

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March 18, 21.

[IN THE COURT OF APPEAL.]

IN RE HAWKINS. EX PARTE OFFICIAL RECEIVER.

Bankruptcy—Discharge of Bankrupt—Discharge to take effect on payment of Specified Dividend—Accruer of Property to Bankrupt—Rights of Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 28, 44, 65—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-s.* 2 (*III.*).

In a bankruptcy under the Bankruptcy Act, 1883, an order was made in 1886 that the bankrupt's discharge should be suspended until he had paid to the trustee such a sum, as with the dividend declared, or to be declared, would enable the trustee to pay to the creditors who had proved, or should prove, their debts 5*s.* in the pound thereon, and that the order of discharge should take effect and come into operation on the day of payment of that sum to the trustee. A dividend of 1*s.* 3*d.* in the pound having been paid to the creditors, the bankrupt's father died in 1891, having by his will bequeathed to the bankrupt a legacy, the amount of which was much more than sufficient to pay the remainder of the 5*s.* in the pound :—

Held, that the order was not a valid one under the Bankruptcy Act, 1883, but that, as it had been acted upon for five years, it must now be treated as valid :

Held (by Lord Esher, M.R., and Lopes, L.J.), that, assuming the order to be valid, the legacy vested in the trustee on the death of the father; that the bankrupt thereupon obtained his discharge, but that the whole of the legacy was divisible among the creditors :

Held, by Fry, L.J., that the intention of the order was that the creditors should be entitled to no more than 5*s.* in the pound, and that in order to effect that intention the legacy must be considered as having, in contemplation of law, devolved in two sums at two successive moments of time—viz., that, first, so much of the legacy as was required to complete the payment of the 5*s.* in the pound vested in the trustee, whereupon the bankrupt's discharge took effect; and, secondly, the remainder of the legacy vested in the bankrupt, as being then discharged, for his own benefit.

APPEAL by John Hawkins, jun., a bankrupt, against an order of the judge of the Walsall County Court, refusing an application by the bankrupt for a declaration that a conditional order of discharge, which had been granted to him on November 18, 1886, had taken effect.

Hawkins was adjudged a bankrupt in the county court in 1885. The official receiver acted as trustee in the bankruptcy. A dividend of 1*s.* 3¾*d.* in the pound was paid to the creditors. In 1886 the bankrupt applied for his discharge, and upon this application the judge, on November 18, 1886, ordered "that the

bankrupt's discharge be suspended until he has paid to the trustee for the time being of his estate such a sum as, with the dividend declared, or to be declared, will enable the trustee to pay to the creditors of the bankrupt who have duly proved, or shall hereafter duly prove, their debts 5*s.* in the pound thereon; and that this order of discharge do take effect and come into operation on the day of payment of such sum to the trustee, and that the trustee do forthwith after such payment file with the proceedings in this case a certificate that he has received the said sum."

On June 1, 1891, the bankrupt's father died, having by his will, dated April 8, 1890, bequeathed to the bankrupt a share of the residue of his estate, the value of which share was estimated at 800*l.* On June 13, 1891, the official receiver wrote to the solicitor to the executors, who was also the bankrupt's solicitor, giving him notice that "as trustee of the bankrupt's estate, I claim to be entitled to all the share and interest of the bankrupt under his father's will. . . . You will understand that I contend that my claim to the share of the bankrupt under his father's will is not affected by the order of discharge." On June 24, 1891, the bankrupt's solicitor, on behalf of the trustees of the will, paid to the official receiver 400*l.*, as part of the bankrupt's interest under the will. The bankrupt's solicitor contended that this was a payment by the bankrupt on account of the 5*s.* in the pound mentioned in the order of discharge; and that as, with the dividend already paid, it more than made up the 5*s.*, the trustee ought to file the certificate mentioned in the order of discharge. The trustee refused to file the certificate, and said that he claimed to be entitled to the 400*l.* "as part of the share of the bankrupt under his father's will, which share was vested in me immediately upon the father's death, in consequence of the bankrupt being then an undischarged bankrupt."

On July 30, 1891, the bankrupt applied to the county court for an order "declaring that the bankrupt has, in accordance with the terms of the order of November 18, 1886, paid to the official receiver, as the trustee for the time being of his estate, such a sum as, with the dividend declared, will enable the official

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receiver to pay to the creditors of the bankrupt who have duly proved their debts 5*s.* in the pound thereon, and that the order of discharge took effect, and came into operation on the day of payment of such sum to the official receiver; and directing the official receiver to pay to the bankrupt the surplus (if any) of the said sum remaining in the hands of the official receiver, after making up the dividend to the creditors of 5*s.* in the pound, and paying the costs relating thereto." This application was refused with costs.

The bankrupt appealed to the Divisional Court.

Yate Lee, for the bankrupt.
Muir Mackenzie, for the official receiver.

VAUGHAN WILLIAMS, J. I am of opinion that the order of the county court must be discharged, and that an order must be made declaring that the discharge will take effect after a sufficient part of the 800*l.* which has come to the bankrupt under the will of his father has been applied in paying the remainder of the 5*s.* in the pound mentioned in the order of November 18, 1886, and any consequent costs, if there are any, which ought to be included.

I think a good deal might be said in favour of the view taken by the learned county court judge, and it deserves to be thoroughly examined before we differ from it.

The original order was, that the bankrupt's discharge was to be suspended until he had paid to the trustee of his estate such a sum as would enable the trustee to pay to the creditors of the bankrupt a dividend of 5*s.* in the pound on their debts, and that the order of discharge should take effect and come into operation on the day of the payment of such sum to the trustee.

The case really depends upon the meaning of that order. It may mean that everything is to go on as in an ordinary bankruptcy until the discharge takes effect, and that such property as the bankrupt from time to time acquires, or as devolves upon him, is to vest in the trustee immediately, or at all events upon his intervening to claim it. If that is the meaning of the order, and that, as I understand it, is the meaning which the learned

county court judge attributed to it, the result would seem to be that the bankrupt would never be able to pay the 5*s.* in the pound, except at the will of the trustee; because, as fast as any property was acquired by the bankrupt or devolved upon him, the trustee might intervene and claim it, just as he has now intervened and claimed this legacy, and so prevent the bankrupt from ever paying the 5*s.* in the pound. Although the words of the order, construed literally, may possibly bear that construction, I do not think that we ought to come to the conclusion that that was the intention of the order, unless the words give us no choice. Mr. Muir Mackenzie did not, as I understood him, contend that that was the true meaning of the order. He sought to draw the line at the bankrupt's earnings, and said that, according to the true meaning of the order, the bankrupt was only to be entitled to after-acquired property to the extent of his personal earnings, and that the intention was that he should buy his discharge by the payment of 5*s.* in the pound, to be earned by him as wages or salary. I do not think that is the meaning of the order. No such line is drawn in the words, and, when we recollect the reason why a bankrupt is entitled to retain his personal earnings as against his trustee in bankruptcy, it seems hardly probable that such could have been the intention of the order. The reason why an undischarged bankrupt is entitled to retain his personal earnings is, that he must be allowed to support himself and those whom it is his legal duty to support, and that he cannot be converted into a mere slave or personal chattel of his creditors. I think, therefore, that the line cannot be drawn at that point. At one stage of the argument it was suggested that the line was to be drawn at property devolving upon the bankrupt by will or by settlement, and that the intention was that the bankrupt should not be allowed to pay the 5*s.* in the pound out of property so devolving on him, but should pay it only out of property afterwards acquired by him. I cannot find any such distinction in the words of the order. An attempt was also made to draw the line at moneys acquired under a contract, and it was said that the bankrupt was not to pay the 5*s.* in the pound out of such moneys. I cannot find anything in the words to justify the drawing of the

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line at any of these points. Then how ought the order to be construed? In my opinion, in this way—if the bankrupt is able to pay 5*s.* in the pound out of any property whatever, whether it is his personal earnings or his earnings in trade, or property which has come to him by legacy, or settlement, or otherwise, provided that his title to it arose after the order, he is entitled on the payment of 5*s.* in the pound by means of that property to his discharge, and he is entitled to use those moneys for that purpose, although the property which is the source of these moneys would, under the terms of the Bankruptcy Act, pass to the trustee until the discharge. That, as it seems to me, is the common-sense view of the intention of the order. I do not mean to say there are not some reasons, based on expediency, to be urged against this view. It may be said that it would not be desirable that, when property has come to a bankrupt in this way by will after he has obtained a conditional or suspended order of discharge, he should keep it himself. It might be (it is not so in the present case) that a large property, sufficient to pay his creditors 20*s.* in the pound, had come to the bankrupt, and in such a case it would not be desirable that he should be able to send his creditors to the right about with a mere 5*s.* in the pound. But I think the answer to that is, that the same undesirable result will arise whenever a bankrupt obtains his discharge, and afterwards has the good fortune to come in for a large legacy. I do not see that any objections based upon mercantile or commercial expediency exist in the one case more than in the other. At all events, whatever those objections may be, we have to construe this order, and, according to my view, the most reasonable construction is that which I have given to it.

In my opinion the bankrupt is entitled to his discharge upon the payment of the remainder of the 5*s.* in the pound out of the legacy, and the surplus must go to him, subject to what I have said about the costs, if any.

COLLINS, J. I am of the same opinion. The question turns entirely upon the construction of the order of November 18, 1886, and it seems to me that there is nothing to prevent us from giving effect to what, I think, was obviously intended by it.

The order on its face entitles the bankrupt to his discharge upon the performance of a condition; it states in express terms that the discharge is to be given upon a certain payment being made by the bankrupt to the trustee. It seems to me that that condition is incompatible with the idea that the person who receives, viz., the trustee, should simply receive his own money, and that the person who pays should pay, not his own money, but the money of the person to whom he is paying it. According to the argument of Mr. Muir Mackenzie it would seem that the only fund (subject to one exception) out of which the bankrupt could pay the 5*s.* would be by anticipating the trustee in dealing with money which was really the money of the trustee, but which the bankrupt might be able to get into his hands before the trustee intervened, and that the payment contemplated by this order would, therefore, be a payment wrongfully made by the bankrupt to the trustee of the trustee's own money. I think that would be an insensible intention to attribute to the parties at the time when the order was made. The only other source from which, according to Mr. Muir Mackenzie's construction, the sum, which it was contemplated might at some time or other be paid by the bankrupt to enable him to obtain his discharge, could be derived, would be his personal earnings. But, having regard to the great doubts which appear to have been expressed in many of the cases as to how far the personal earnings of an undischarged bankrupt are really his property as against his creditors, that is, how far he is entitled to any surplus over and above that which is necessary for the sustenance of himself and his family, I do not think that in construing this order it would be fair to assume that it was intended that the bankrupt should receive a larger sum than was necessary for the sustenance of himself and his family, and should devote the surplus to paying the balance of the 5*s.* in the pound. I gather from the cases that the Judges have been disposed to limit the bankrupt's right to his personal earnings to such a sum as is necessary for the sustenance of himself and his family, and that if a bankrupt (an actor for instance) were earning a very large salary, the surplus, over and above that which was necessary for the sustenance of himself and his family, might be held to be the property of his

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creditors. If that be the true view of the right of the bankrupt as regards his personal earnings, Mr. Muir Mackenzie's construction gives no fund out of which the difference between the dividend already paid and the 5*s.* in the pound could possibly be paid by the bankrupt. It seems to me that the order contemplated that the bankrupt should pay, and properly pay, that difference to the trustee, who, but for that payment, would not be entitled to receive it, and the order empowers the bankrupt himself to receive and appropriate funds, and if he does so, and is able to appropriate funds to the extent of the difference between the dividends already paid and the 5*s.* in the pound, then he is to be entitled to an absolute discharge. I agree with the view taken by my brother Vaughan Williams.

The official receiver obtained leave to appeal.

March 18. *Sir E. Clarke, S.G.*, and *Muir Mackenzie*, for the official receiver. When the 800*l.* devolved on the bankrupt upon the death of his father he was undischarged, and therefore the 800*l.* vested in the trustee under s. 44 (1) of the Bankruptcy Act, 1883. The 5*s.* in the pound had not then been paid, and, until it had been paid, the discharge would not take effect. The bankrupt is not discharged until the condition has been fulfilled, and before it was fulfilled the 800*l.* had vested in the trustee. Until the bankrupt's creditors have been paid in full, the trustee cannot hand over any moneys which have vested in him to the bankrupt.

(1) By s. 44 "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt," shall comprise (inter alia) "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve upon him before discharge."

By s. 54 "(1) Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee.

"(2) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed."

Sect. 65 "The bankrupt shall be entitled to any surplus remaining after payment in full of his creditors, with interest, as by this Act provided, and of the costs, charges, and expenses of the proceedings under the bankruptcy petition."

The discharge is in the Form No. 62 B, given in the Appendix to the Bankruptcy Rules, 1890.

[FRY, LJ. I doubt whether the order is one which could be made under s. 28 (1) of the Bankruptcy Act, 1883.]

Sub-s. 2 (III.) of s. 8 of the Bankruptcy Act, 1890, expressly provides that, on proof of certain facts, the Court shall (as one of several alternatives) "suspend the bankrupt's discharge until a dividend of not less than 10*s.* in the pound has been paid to the creditors." But that Act does not apply to the present case.

Yate Lee for the bankrupt. Such a conditional order of discharge was not valid under the Act of 1883. But, assuming it to be valid after the time which has elapsed, the beneficial interest in the share of residue given to the bankrupt by his father's will vested in the trustee at the moment of the father's death, and thereupon the 5*s.* in the pound was paid to the trustee, and the discharge took effect. The meaning of the order is, that as soon as the 5*s.* is paid, the trustee is not to have any more. By s. 44 the property which vests in the trustee is that which devolves on the bankrupt *before* his discharge, not that which devolves on him *at the moment of* his discharge. The discharge came into operation the moment the 5*s.* was paid, that is, at the moment of the father's death. The intention of the order must be regarded, and the Court will not attribute to it a result which would be unreasonable and unfair: *Ex parte Tinker* (2); *In re Caughey.* (3) The order includes a payment of the 5*s.* by means of property which by law vests in the trustee, as well as by means of a salary or personal earnings of the bankrupt.

Sir E. Clarke, S.G., in reply. An order of discharge in this form would be valid under the Act of 1890. The question is, therefore, one which may arise in future. The true construction of the order is, that the bankrupt became discharged so soon as the 800*l.* vested in the trustee, but the creditors were entitled to

(1) Sect. 28 provides that, on proof of certain facts, the Court shall either refuse an order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after acquired property.

(2) Law Rep. 9 Ch. 716.

(3) 4 Ch. D. 533.

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the whole 800*l.*, which had vested in the trustee before the discharge took effect.

Cur. adv. vult.

March 21. LORD ESHER, M.R. This case has raised an extremely difficult question as to the true construction of the Bankruptcy Act, 1883. The respondent having been adjudged a bankrupt, an order was made by the county court that he should obtain his discharge on the payment of a dividend of 5*s.* in the pound to his creditors. In other words, he was to be discharged on condition of his paying 5*s.* in the pound to his creditors. It is true that that was a bad order under the Bankruptcy Act, 1883, which was then in force. But, if we treat it now as a bad order, then there was no jurisdiction to make it. I think, therefore, that, although it was an irregular order, yet after the length of time which has elapsed since it was made, we must treat it as having been validly made under the Bankruptcy Act, 1883. It is, therefore, a conditional order that the bankrupt shall have his discharge on payment of 5*s.* in the pound to his creditors. The order was acted upon, and a dividend of 1*s.* 3*d.* in the pound was paid to the trustee for the benefit of the creditors, but, before the whole 5*s.* in the pound had been paid, the bankrupt's father died, having by his will bequeathed to him a share of residue, of an amount more than sufficient to pay the remainder of the 5*s.* in the pound, and with part of that residue the trustee has paid, or is now ready to pay, the remainder of the 5*s.* When that has been done there will be a surplus, and the question is, whether that surplus has vested in the trustee, or whether it belongs to the bankrupt, who will then be discharged.

The answer to the question must depend upon the construction of the statute; there is no law governing the case outside the statute. The order purports to be made under sect. 28 of the Act. [His Lordship read ss. 28 and 44, and continued:—] The question therefore, and it is an extremely nice one, is, whether this share of residue is "after-acquired property," or whether it is, within the meaning of s. 44, property which "may be acquired by or devolve upon the bankrupt before his discharge." That must mean property which devolves upon him

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after the commencement of the bankruptcy and before the discharge, otherwise it would have no meaning. Now when was the bankrupt's discharge in the present case? It is a conditional discharge; it is to take effect when the bankrupt shall have paid 5*s.* in the pound. Taking this to be a good order under the statute, I have no doubt that the moment the bankrupt pays the 5*s.* in the pound he is discharged. But then arises the question, Did this property devolve upon him before or after his discharge? When did this property belong to him? It belonged to him in one sense the moment his father died, though he could not get it then, for an executor has a certain time allowed him for the administration of his testator's estate. But, assuming that the property did in a certain sense in law vest in the bankrupt at the moment when his father died, when did his father die? He died after the commencement of the bankruptcy and before the condition had been fulfilled. But then arises a question of the utmost nicety, When was the condition fulfilled? It is said, on the one side, that the condition was fulfilled the moment the father died, because at that moment property devolved on the bankrupt which was sufficient to pay the 5*s.*, and therefore at that moment the bankrupt could pay the 5*s.*, and so much of the property as was required to make up the 5*s.* vested at that moment in the trustee for the benefit of the creditors. If it then vested in the trustee and he had power over it, at that moment the bankrupt could pay the 5*s.* in the pound, and at that moment, therefore, it is said the discharge took effect. And, it is said, that, the discharge taking effect at that moment, the surplus of the property coming from the father, above and beyond the 5*s.*, has not devolved on the bankrupt after his discharge, but at the very moment of his discharge. At the moment that the sum sufficient to make up the 5*s.* came to him, at that very same moment, he was discharged. The remainder of the father's legacy came to him at the same moment as, not after, the discharge. It comes, as it seems to me, to this—there is one sum of money bequeathed by the father, one sum of money coming to the bankrupt at one time. Did one part of that sum come to him at one moment and the remainder at the next moment? It seems to me impossible to say so. It is too fine a distinction to be acted upon.

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If the distinction were sound the result would be, that, if the property which came to the bankrupt were a packet of bank-notes or a box of sovereigns, so many of the bank-notes or of the sovereigns as would be required to make up the 5*s.* would come to him at one moment and the remainder of the very same parcel, which was placed in his hands at one and the same moment, must be considered in point of law as having come into his hands at another moment, viz., after his discharge. I must confess it seems to me that, if you take a bundle of notes, or a box of money and put it into my hand, it is not true to say that one part of it comes into my hands at one moment and another part of it at another moment. It all comes into my hand at the same moment of time. I cannot but think that all this 800*l.* came into the hands of the trustee at one and the same moment, and, if so, at that moment he was able to pay the 5*s.* in the pound. In my opinion, the whole of the 800*l.* came to the bankrupt before the 5*s.* was or could be paid, and therefore it came to him before the discharge took effect. The moment the 5*s.* was paid I think the bankrupt became discharged. The bankrupt is discharged, and there is a sum of money in the trustee's hands. What is to become of it? What is the trustee to do with it? It is in his hands—vested in him. I think his conduct must be governed by s. 65, which says that "The bankrupt shall be entitled to any surplus remaining after payment in full of his creditors." Not, after having paid the amount which entitles him to his discharge, but after payment in full of his creditors. In my view, therefore, according to the true interpretation of the Act, the bankrupt is discharged when the 5*s.* is paid, but at that moment there is a surplus in the hands of the trustee; he is not to give it back to the bankrupt, and he cannot keep it himself. It seems to me that the necessary inference from the words of sect. 65 is, that the trustee is to divide that sum equally amongst the creditors.

My decision, therefore, results in this, that, whenever there is such a conditional order of discharge, if a windfall comes to the bankrupt after the order and before the condition has been fulfilled, this does not affect the discharge. The discharge depends upon the terms of the order; but the money remains in the hands of the trustee, and the creditors get the advantage of the wind-

fall, not the bankrupt. That, I confess, seems to me a more just conclusion than that the bankrupt, by reason of the order of the Court, or even by agreement with the creditors (the Court or the creditors not knowing at the time that there would be any windfall), might be able to walk off with 10,000*l.* or 20,000*l.*, or even 100,000*l.*, while his creditors might be left with a payment of only 5*s.* in the pound. This might be the result under the Act of 1883. That precise result could not arise under the Act of 1890, because under it the condition must be the payment of a dividend of at least 10*s.* in the pound; but still the bankrupt who owed money to his creditors would, upon such a windfall as this happening, be able to get his discharge on the payment of 10*s.* in the pound, and to walk off with 100,000*l.* in his pocket, whilst his creditors would have lost the money which they had paid either for him or to him, or the price of goods in respect of which they had given him credit. I think the conclusion to which I have come is justified by the Act, if the Act is read according to the ordinary meaning of its terms, and it is a just and right conclusion. In my opinion, therefore, assuming the order to be a valid order under the Act, it was a conditional order; this windfall came before the condition was fulfilled, before the bankrupt's discharge, and the surplus beyond the 5*s.* in the pound must, therefore, be distributed amongst the creditors.

The question is one of the utmost importance, because it may arise under the Act of 1890, which expressly provides for the granting of orders of discharge in this form.

FRY, L.J. The true solution of the difficulty appears to me to depend upon the construction of the order of November 18, 1886, and of s. 44 of the Act of 1883. With regard to the validity of the order, I agree in the view which has been expressed by the Master of the Rolls. I think the order cannot be maintained under the Act of 1883. But it was made some years ago, it has been acted upon, and it has not been appealed against, and, therefore, I think we are bound now to treat it as a valid order. The question, therefore, is one of construction. [The Lord Justice read the order, and continued:—] It appears to me that the order contemplated two descriptions of payments—payments by

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means of money vesting in the trustee as trustee, and payments to be made by the bankrupt to the trustee, either out of personal earnings which might not pass to the trustee under the Bankruptcy Act, or by means of the bounty and kindness of his friends. It contemplates, no doubt, the possibility of payments of the latter description. But, nevertheless, it seems to me clear that the order may be satisfied, either by payment wholly out of money coming to the trustee as part of the estate, or wholly by payments made by the bankrupt or his friends, or partly in one way and partly in the other. The order is, therefore, careless as to the mode of payment, and the source from which the moneys paid are derived. Again, be it observed, the order is careless with regard to time. What, then, is the substance of the order? In my opinion, it is in substance a provision that the property of the bankrupt, to the extent of 5*s.* in the pound upon his debts, shall go to the trustee, but that the surplus shall belong to the bankrupt. The discharge is to take effect whenever the 5*s.* is paid, be it a short or a long time. It is true that the dividing-line between the vesting of property in the trustee and the vesting of property in the bankrupt is expressed in words of time—until such and such a thing has occurred; but the real dividing-line appears to me to be not time but amount—over and above the 5*s.* in the pound everything is to vest in the bankrupt. That, in my opinion, is the substance and meaning of the order. Now, the circumstances to which we have to apply this order are shortly these. Some years after the order was made a sum of about 800*l.* devolved upon the bankrupt, of which about 300*l.* is required to make up the 5*s.* in the pound. The remaining 500*l.* is not required. This sum then devolved upon the bankrupt. Did it pass to the trustee? Suppose the 800*l.* had devolved pound by pound successively upon the bankrupt, it is plain that it would have vested pound by pound in the trustee until 300*l.* had vested in him. The moment that had happened the bankrupt's discharge would have taken effect. The condition would have been satisfied, the contingency would have happened, and the bankrupt would thereupon have been discharged. The remaining 500*l.*, as they devolved pound by pound upon the bankrupt, would have vested in him, and would not have passed to

his trustee. Now, can it make any difference that the whole sum of 800*l.* devolved on the bankrupt at one moment? Is it reasonable that the mere coincidence in time of the accruer should give to the trustee more than the 5*s.* in the pound, which was the limit of the intention of the parties to the order? I think it is not, for the reasons which I have already given. I think the substance of the order is amount and not time. The dividing-line is amount not time. The true view, I think, is this: the 800*l.* must be treated as having in point of law devolved on the bankrupt in two sums. First, in point of law, the 300*l.* devolved on him, and thereupon his discharge took effect. Then the remaining 500*l.* devolved on him, and that vested in the bankrupt, and did not pass to the trustee. That, in my view, is the substance of the order as applied to the events which have happened.

Now turn to s. 44 of the Act, which provides that "the property of the bankrupt divisible amongst his creditors" shall comprise (amongst other things) "all such property as may be acquired by or devolve upon him before his discharge." Then we are involved in this difficulty. The discharge in the present case is contingent upon the property devolving; but the devolution took place before the discharge. It is said, on the one hand, by the bankrupt to the trustee, "You cannot take this money, because the devolution was not before the discharge; it was at the discharge." But, in exactly the same way, the trustee may say to the bankrupt, "You cannot take the money, because you can only take what devolves on you after the discharge, and the devolution was, not after, but at the discharge." We are, therefore, involved in this difficulty. The law has contemplated two periods of time, before the discharge, and after the discharge, but this event happened in neither of these periods; it happened at the moment of the discharge. How is that difficulty to be solved? I think it must be solved in exactly the same way as the difficulty which arises upon the order. We must consider that the 300*l.* vested before the discharge, then the discharge took effect, and the remaining 500*l.* vested after the discharge. For this mode of dealing with the difficulty created by time, there seems to me to be abundant authority. Take the case of

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a power to revoke uses and thereafter to appoint new uses. A deed is executed which contains a revocation of the old uses, and an appointment of new uses; that appointment would not be good if the old uses were still standing; but the instrument is one instrument and is executed at one moment of time. What has the law done? It has severed the two acts, and has said that the one deed, executed at one single moment of time, is to take effect so that the revocation of the old uses shall operate first, and the appointment of the new uses secondly. That was determined in *Fitzwilliam's Case* (1) where it is said, "For, to the intent that the new uses shall be created, the law adjudges that the clause of destruction shall have the priority, although both be contained in one and the same deed, and take effect by one and the same delivery." A similar difficulty has arisen where a lease and a release have been contained in the same instrument. The release cannot take effect to pass the remainder unless the lease is in existence, but they are both contained in the same deed. Here, again, in order to give effect to the intention of the parties, it has been held that the lease operates first, and vests one estate in the lessee, and then the release operates afterwards, which can only operate if the lease has taken effect first. This was so held in *Barker* v. *Keete* (2), where North, C.J., said "he had known it ruled several times, that a lease and release in the same deed was a good conveyance, for priority should be supposed." The same thing has been held with regard to the construction of Acts of Parliament. A question having arisen under an Act by which a father and a son were both naturalized, it was held that it must have been the intention that the Act should take effect as regarded the father before it took effect as regarded the son. That case is referred to in *Collingwood* v. *Pace* (3), where it is said, "If the father and the son be both at once naturalized by Act of Parliament, and then the father purchaseth lands, it was the opinion in *Godfrey's Case*, that the son should inherit the father. The law will make a priority, though in the same Act, according to the order of nature and the intent of the Act." I think, therefore, there is ample authority

(1) 6 Rep. 32 a, 32 b.

(2) Freem. (K.B.) 251.

(3) Bridg. 455.

for this proposition, that, whenever a thing is in fact done at a single instant of time, but, in order to effect the intention of the parties, it is necessary to consider that single act as if it were a double act, and as if the single moment of time were two instants of time, then in contemplation of law the time must be taken as split into two instants of time, and that priority must be given to the one act over the other which is necessary in order to effect the intention of the parties.

If, therefore, I am right in thinking that the real substance of the order is to introduce a limit as to amount of property and not as to time, then, although the order is expressed in terms of time, I think that the time must, under the circumstances, be split up, and priority given so as to effect the true intention of the order. In my opinion, therefore, although I am sorry that I feel obliged to differ from the Master of the Rolls, the order of the Divisional Court is right.

LOPES, L.J. I am compelled, though very reluctantly, to arrive at the same conclusion as the Master of the Rolls. I say reluctantly, because I think that in all probability we are not giving effect to the real intention of the parties. I cannot doubt that their intention was, that the bankrupt should become a free man so soon as the 5*s.* in the pound had been paid.

The order of discharge purported to be made under s. 28 of the Bankruptcy Act, 1883. It is a conditional order, and some kinds of conditional order are authorized by s. 28. The section empowers the Court to grant an order of discharge "subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property." But the present order is conditional with regard to none of those matters. It is conditional upon the bankrupt paying 5*s.* in the pound to his creditors. I am clearly of opinion that it is a bad order under s. 28. But I entirely agree with the other members of the Court that, the order having been acted upon for so long, it would not be desirable for this Court now to treat it as other than a valid order.

But then arises a question upon s. 44 of the Act. At the time of the death of the bankrupt's father only 1*s.* 3*d.* of the

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5*s.* had been paid. On June 1, the father died and there then devolved upon the bankrupt a sum of about 800*l.*, which was much more than sufficient to pay the balance remaining unpaid of the 5*s.* The question is, In whom did the 800*l.* vest? Now s. 44 says that there shall be divisible among the bankrupt's creditors "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." No doubt this 800*l.* accrued after the bankruptcy, and in my view it accrued before the discharge. When the father died the right to the 800*l.*, which passed by his will, must have vested in somebody. In whom did it vest? In my view it vested in the trustee. It vested immediately on the death of the father. The 5*s.* in the pound at that time had not been paid. At the moment of the vesting the bankrupt was undischarged, and, therefore, I am compelled to come to the conclusion that the 800*l.* vested in the trustee under the provisions of s. 44.

But it has been said that the 800*l.* devolved in two sums, one part of it passing to the trustee, and paying the remainder of the 5*s.*, and the other vesting in the bankrupt. I am unable to adopt that conclusion. Suppose that which passed to the bankrupt under the father's will had been a 1000*l.* note, could it be said that a part of that note vested in the trustee, and the other part in the bankrupt? It appears to me that the whole of the money vested at one moment, and, therefore, it vested in the trustee, because at that moment the bankrupt was undischarged. That being so, the money became divisible amongst his creditors, because, by s. 65, the bankrupt is only entitled to any surplus remaining after payment in full of his creditors. I agree, therefore, with the judgment of the Master of the Rolls.

Appeal allowed.

Solicitors: *Solicitor to Board of Trade*; *Batten, Proffitt, & Scott.*

W. L. C.

[IN THE COURT OF APPEAL.]

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1892
April 28;
May 7.

HOGARTH *v.* JENNINGS.

Landlord and Tenant—Distress—Bailiff—Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 7.

The Law of Distress Amendment Act, 1888, s. 7, provides that no person shall act as a bailiff to levy any distress for rent, unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge:—

Held, that the managing director of an incorporated company, who distrained in person for rent due to the company, acted as a bailiff within the meaning of the above-mentioned enactment.

APPLICATION by plaintiff for judgment or a new trial on the ground of misdirection.

The action was for (inter alia) trespass by a wrongful distress.

The facts, as they appeared at the trial before Collins, J., with a jury, so far as material to this report, were as follows:—

The defendant was the managing director of Jennings Brothers, Limited, a brewery company. The plaintiff was tenant of certain premises to the company. The defendant in person entered on the premises and levied a distress for rent upon the plaintiff's goods.

It was contended that, not having a certificate from a county court judge, under the Law of Distress Amendment Act, 1888, s. 7, the defendant was a trespasser. (1) The learned judge ruled that the defendant was for this purpose in the position of the landlord of the premises, and did not require a certificate; and he accordingly directed a verdict for defendant on this part of the claim.

(1) Law of Distress Amendment Act, 1888, s. 7, provides that: "From and after the commencement of this Act no person shall act as a bailiff to levy any distress for rent, unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge, and such certificate may be general or apply to a particular distress or distresses; . . . . if any person holding a certificate shall be proved to the satisfaction of the judge of a county court to have been guilty of any extortion or other misconduct in the execution of his duty as a bailiff, he shall be liable to have his certificate summarily cancelled by the said judge. . . . . If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying, and any person who has authorized him so to levy, shall be deemed to have committed a trespass."

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April 28. *Henry*, for the plaintiff. The defendant can only justify distraining as a bailiff. No one can distrain but the landlord or a bailiff appointed by him. The landlord in this case was the company, not the defendant. Every agent for the purpose of distraining is a bailiff: *Pullen* v. *Palmer*. (1) A corporation aggregate can only distrain through their bailiff; Bacon's Abridgment, vol. 2, Corporation, E. 2. [He also cited *Pitt* v. *Snowden*. (2)]

Gully, Q.C., and *Mattinson*, for the defendant. The defendant was not the bailiff of the company in the sense intended by the word "bailiff" in the Act. He was not a mere agent of the company employed for the purpose of making a distress. A company can only act through its director or directors, and the action of the director is in law that of the company. The section had in view persons acting as professional bailiffs. It is contended that the word "bailiff" in the section means an agent appointed merely for the purpose of making a distress.

Henry, in reply.

Cur. adv. vult.

May 7. FRY, L.J. This case turns upon the Law of Distress Amendment Act, 1888, s. 7. The defendant was the managing director of a brewery company, and, without any authority other than the general authority which he might derive from his position as managing director, he levied a distress on the plaintiff's goods. The question is whether he was acting as a bailiff within the meaning of the section. The argument for the plaintiff was that no person can levy a distress, unless he is either the legal owner of the premises or bailiff of the legal owner; it was said that the defendant was not the legal owner, and therefore can only justify as bailiff. I doubt whether this argument can be maintained in its entirety. There are certain cases in which persons are authorized by statute to distrain, although they are not legal owners of the premises: e.g., after the death of a cestui que vie, the tenant pur autre vie can distrain for rent due to him; so also the executors of an owner in fee simple after his death may distrain for rent due to him. In the cases also of a receiver appointed by the Court of Chancery

(1) 3 Salk. 206.

(2) 3 Atk. 750.

with power to distrain before attornment, of a sequestrator, and of the committee of a lunatic, I am not satisfied that such persons may not justify a distress by virtue of their appointment. I express no opinion on the point, but I am not satisfied to the contrary. The question, however, remains whether in this case the defendant can justify distraining in any other capacity than as a bailiff. I do not think that he can. I think that a bailiff for making a distress means a person authorized and appointed for that purpose. Assuming that the defendant had authority to distrain from the company, I think that he had it as a bailiff. This is very clearly shewn by the case of *Leigh* v. *Shepherd* (1), from which it appears that one of several co-owners may distrain without any actual authority from the others, but that if he do he can only avow in replevin as the bailiff of the others. That seems to have been determined as long ago as 15 Hen. 7, and is a strong illustration of the general principle that any person who is not the owner of the premises, and has no special or statutory authority, such as I have mentioned, must justify as bailiff of the owner. I think, therefore, that the defendant was not entitled to distrain, as he had no certificate, and consequently he was a trespasser.

It appears that the goods were only detained for a few hours, and were then given up on payment of the rent due by the plaintiff. He only paid that which he owed, and it seems to me that, under the circumstances, the damages were only nominal. The judgment, therefore, must be entered for the plaintiff on this part of the claim for nominal damages. (2) I am authorized by the Master of the Rolls to say that he agrees with the conclusion at which I have arrived, and the reasons which I have given for it.

LOPES, L.J. I am of the same opinion. The question we have to decide is whether the defendant, who was the managing director of a brewery company, can justify levying a distress otherwise than as bailiff of the company. I am of opinion that he cannot. He was not the legal owner of the premises, nor can he say that he had any statutory authority like that of an

(1) 2 B. & B. 465.

(2) The statement of claim included other matters, in respect of which the plaintiff recovered 10*l.* damages.

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executor and the other persons referred to who are authorized by statute to distrain. I am of opinion that he can only justify as a bailiff, and that he comes within the words and meaning of the section.

Application granted.

Solicitors for plaintiff: *Wood & Wootton, for T. Milburn, Workington.*

Solicitors for defendant: *Speechly, Mumford, Landon, & Rodgers, for Paisley & Falcon, Workington.*

E. L.

C. A. 1892 *May* 9.

[IN THE COURT OF APPEAL.]

KELLY *v.* ROGERS.

Landlord and Tenant—Covenant for quiet Enjoyment—Interruption—Underlease—Re-entry by Original Lessor for Breach of Covenant.

An underlease contained a covenant by the lessor for quiet enjoyment of the demised premises by the lessee "without any interruption from or by him, the said lessor, his executors, administrators, or assigns, or any person or persons whomsoever lawfully claiming by, through, or under him." The owners of the reversion upon the original lease recovered possession of the premises under a condition of re-entry contained in such lease for non-payment of rent and breach of covenant:—

Held, that there was no breach of the covenant for quiet enjoyment in the underlease, the interruption being the act of the superior landlord, not that of the sub-lessor or any person claiming by, through, or under him.

APPLICATION by defendant for judgment or a new trial, on the ground of misdirection.

The action was for breach of a covenant for quiet enjoyment, and was tried by Grantham, J., with a jury.

The facts were as follows:—In 1857 two houses were demised to the defendant's father for a term of ninety-nine years, the lease containing a covenant to repair and a condition of re-entry for non-payment of rent or breach of covenant. In 1863 the defendant's father granted an underlease of one of the houses included in the original lease to one Daymont. The underlease contained a covenant by the lessor for himself, his heirs, executors, administrators, and assigns, with the lessee, his executors, administrators, and assigns, that, he and they paying the rent in manner thereinbefore mentioned, and observing and performing

all and singular the covenants, conditions, and agreements hereinbefore on his and their part contained, should and might peaceably possess and enjoy the said demised premises, "without any interruption from or by him, the said lessor, his executors, administrators, or assigns, or any person or persons whomsoever lawfully claiming by, through, or under him." The plaintiff, as assignee of the underlease, sued the defendant as assignee of the lease. The alleged breach of covenant was that, the defendant having failed to pay the rent reserved by the original lease, and to keep the other house in repair, the owner of the reversion upon the original lease sued for and recovered possession of the premises included therein upon the condition of re-entry.

The learned judge left the case to the jury, who found a verdict for the plaintiff, damages 500*l.*

Crump, Q.C., and *H. E. Duke*, for the defendant. There was no breach of the covenant for quiet enjoyment. There was no interruption of enjoyment by the defendant or any one for whose acts he was responsible under the covenant. The act of interruption was that of the superior landlord. He cannot be said to claim by, through, or under the sub-lessor, his own lessee. [They cited *Stanley* v. *Hayes* (1); *Spencer* v. *Marriott* (2); *Harrison* v. *Muncaster* (3); *Anderson* v. *Oppenheimer*. (4)]

Herbert Reed, for the plaintiff. The interruption of the plaintiff's enjoyment was caused by the defendant's conduct in not paying the rent and breaking the covenant to repair in the original lease. It may be said, therefore, to be an interruption "from or by" the defendant. The superior landlord's right to re-enter arose through the defendant's non-feasance, and, therefore, he may be said to claim "through" the defendant. [He cited *Stevenson* v. *Powell* (5); the judgment of Bowen, L.J., in *Harrison* v. *Muncaster*. (3)]

Crump, Q.C., was not called on to reply.

LORD ESHER, M.R. If there were no decision on the subject, I think it would be clear, according to the ordinary meaning of

(1) 3 Q. B. 105.
(2) 1 B. & C. 457.
(3) [1891] 2 Q. B. 680.
(4) 5 Q. B. D. 602.
(5) Bulst. pt. 1, p. 182.

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the words of this covenant in the English language, that they do not include such an interruption of enjoyment as took place here. The defendant has not committed any act of interruption himself, though he has done something which has given the superior landlord power to do such an act. The interruption is the act of the superior landlord. The question is whether the words of this covenant include an interruption by the superior landlord. I am of opinion that they do not. The words are as nearly as possible identical with those of the covenant in *Stanley* v. *Hayes*. (1) It was there held that the words of the covenant did not include such a case as this. Even if we thought that decision wrong or doubtful, which we do not, it has been decided many years, and all the leases since drawn must have been drawn on the faith of that decision. I do not think, therefore, that in any case we ought to overrule it now. For these reasons it appears to me clear that there was no breach of the covenant for quiet enjoyment proved, and that the learned judge ought to have nonsuited the plaintiff. Therefore this application must be granted and judgment entered for the defendant.

FRY, L.J. I am of the same opinion. The only question is whether the interruption of quiet enjoyment by the superior landlord is an interruption by a person claiming by, through, or under the plaintiff's lessor; i.e., whether the superior lessor claims by, through, or under his own lessee. It appears to me clear that, according to the ordinary meaning of words, this question must be answered in the negative. The defendant's landlord claims under a superior title. It is quite true that the superior landlord was entitled to enter by reason of the default of the defendant, but that default does not amount to an act of interruption. The only shadow of authority for the proposition that it does, which was cited to us, was a passage from the judgment of Bowen, L.J., in the case of *Harrison* v. *Muncaster* (2), in which the Court had to construe a somewhat similar covenant. He there says: "I think that an interruption under such a covenant is not caused by the lessor, or by those claiming under him, unless it is either a direct act of interruption, or unless it is some

(1) 3 Q. B. 105. (2) [1891] 2 Q. B. 680.

act of which it either was foreseen, or ought by reasonable care to have been foreseen, that the consequence in the particular case would be an interruption." I am not sure that the learned Lord Justice meant to put that forward as the correct definition of an interruption. The Court were about to hold that in that case there was no breach of the covenant, and he probably was laying down the widest possible definition in order to shew that the case did not come even within that definition. Whether he meant to say affirmatively that anything within that definition constituted an interruption appears to me doubtful; but, even if he meant to go that length, I do not think this case would come within that definition, for it does not appear to me to be shewn that the defendant did foresee, or ought to have foreseen, that the lessor would necessarily enter for the breach of covenant.

LOPES, L.J. In order to maintain an action on a covenant for quiet enjoyment in the present form, it is necessary to shew some act of interruption by the defendant or some person claiming by, through, or under him, against whose act he covenants. The plaintiff is unable to prove any such act here. The only act of interruption was by the superior landlord. I think it clear that this is not within the covenant. With regard to the passage referred to by my brother Fry, from the judgment of Bowen, L.J., in *Harrison* v. *Muncaster* (1), I do not think that, if that is to be pressed as intended to be a correct definition of an interruption, it would help the plaintiff in this case. That being so, it is unnecessary for me to say whether I should go the whole length of that definition or not. For these reasons I think the application must be granted.

Application granted.

Solicitor for plaintiff: *J. H. R. Kelly.*

Solicitors for defendant: *Francis Miller & Co.*

(1) [1891] 2 Q. B. 680.

E. L.

END OF VOL. I.